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No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1999

NOVECON, LTD., NOVECON MANAGEMENT COMPANY, and RICHARD W. RAHN
Petitioners,

v.

BULGARIAN-AMERICAN ENTERPRISE FUND, FRANK L. BAUER, and NANCY L. SCHILLER
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a distinction between libel involving a media defendant and a private defendant under the First Amendment to the Constitution.

2. Whether under the First Amendment to the Constitution, petitioners were public figures involved in a public controversy.

3. Whether a trial court can weigh the evidence on summary judgment in determining whether there was proof of malice sufficient to submit the issue to a jury without violating the Seventh Amendment to the Constitution.

4. Whether reliance by a trial judge on an affidavit of a moving party without giving the non-moving party the right to cross examine the affiant violates Rule 56 of the Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

Richard W. Rahn
Novecon, Ltd.
Novecon Management Company, L.P.
Bulgarian-American Enterprise Fund
Frank L. Bauer
Nancy L. Schiller

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in Case Nos. 97-7178 and 97-7182 on October 25, 1999.

OPINION BELOW

The underlying opinion of the Court of Appeals is reported at 190 F.3rd 556 and is appended hereto (A-1). The Court of Appeals' order denying rehearing is appended hereto. The opinions of the District Court are reported at 967 F. Supp. 1382 ("Novecon I"), 977 F. Supp. 45 ("Novecon II") and 977 F. Supp. 52 ("Novecon III") and are appended hereto.

JURISDICTIONAL STATEMENT

The case was brought in the district court under 28 U.S.C. § 1332 based on diversity of citizenship. The judgment of the Court of Appeals was entered on September 3, 1999. Rehearing was denied by the Court of Appeals on October 25, 1999. The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Amendment One provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

The Constitution of the United States, Amendment Seven provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

COURSE OF PROCEEDINGS AND DISCRIPTION BELOW

Petitioners filed their complaint for breach of contract on June 21, 1995 (JA 304). Jurisdiction of the District Court was predicated on diversity of citizenship, 28 U.S.C. § 1332. Respondents filed a motion to dismiss (JA 315), which the District Court denied. (J.A. 342, 317 and 320). Petitioners filed an amended complaint adding a count for defamation (J.A. 348). Respondents filed an answer and counter claim (J.A. 386). Petitioners filed an answer to the counter claim with affirmative defenses (J.A. 374). Respondents filed a motion for summary judgment (J.A. 370 and 372) and petitioners filed a cross motion for partial summary judgment (J.A. 61). On June 26, 1997, the District Court entered an order granting the respondents' summary judgment in part and denying it in part (Novecon I (A-15)). The respondents filed a motion for reconsideration (J.A. 366). The District Court issued a notice to the parties on July 29, 1997 requesting re-argument on certain issues (J.A. 62). (A-70). After a hearing (J.A. 245) on August 1, 1997 the District Court granted summary of judgment on all issues to respondents and summary of judgment to petitioners on the counter claims of respondents. (Novecon II (A-53-54)). On September 24, 1997 the District Court issued an order clarifying its earlier decision. (Novecon III (A-72)). Petitioners filed their notice of appeal on October 16, 1997 (J.A. 16). Respondents thereafter filed their notice of cross-

appeal (J.A. 292). The Court of Appeals issued its decision on September 3, 1999 (A-1) and denied rehearing on October 25, 1999 (A-28).

STATEMENT OF FACTS

The petitioner Novecon, Ltd. entered into a joint venture in 1991 with a Bulgarian company, Mirpex Co., Ltd., to form Southern Park Development, Ltd. The purpose of the joint venture was the development of real estate in downtown Sofia, Bulgaria (J.A. 72-93). Petitioner Richard Rahn is the President of Novecon.

Novecon entered into an agreement with the Bulgarian-American Enterprise Fund ("BAEF") through a series of correspondence for financing the project culminating in a letter of May 20, 1993 (J.A. 145-48 and 152). On November 2, 1993, BAEF cancelled the project (J.A. 160). Thereafter on June 21, 1995, Novecon commenced this action for breach of contract.

On January 5, 1996, an article appeared in the European edition of the *Wall Street Journal*, written by Greg Rushford that was critical of BAEF. (J.A. 417). On January 16, 1996, a letter appeared in the European edition of the *Wall Street Journal* that was in response to the Rushford article and signed by respondent Bauer on behalf of BAEF (J.A. 420). On January 18, 1996 Frank Bauer and Nancy Schiller, on behalf of BAEF, sent 570 letters to individuals and organizations in Bulgaria and the United States stating in pertinent part:

> Dr. Rahn, through Novecon, seeks to extort $200,000 of U.S. taxpayer money from BAEF as a fee for a real estate project that the BAEF rejected because it turned out to be

a veritable 'Brooklyn Bridge' of misrepresentation.

Novecon thereafter amended its complaint to add a count for defamation of character against BAEF, Bauer and Schiller.

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to reverse the pendulum and establish a proper balance between rights under the First Amendment and redress for defamation of character.

This case raises important questions of law under both the First and Seventh Amendments to the Constitution. The decision of the Court of Appeals is in conflict with its own decision and decisions of the Fourth Circuit in the areas of libel First Amendment law.

1. The question of whether there is a distinction between the First Amendment rights of a party who is part of the media and a non-media or private party have not been clearly resolved by this Court. The District Court relied upon the concurring opinion of Mr. Justice White and the dissenting opinion of Mr. Justice Breman, *Dunn & Bradstreet, Inc. v. Green Mass Builder, Inc.*, 472 U.S. 749 (1985), in holding that the plaintiffs, were public figures under First Amendment standards (App. p. A-49). The District Court then goes on to cite *Swengler v. ITT Corp.*, 993 F. 2d 1063 (4th Cir. 1993). However, the District Court determination (in Novecon II) is in direct conflict with *Swengler* (App. p. A-51) and *Philadelphia Newspapers, Inc. v. Hipps*, 475 U.S. 767, 775 (1986). This case presents this Court with an opportunity to clearly define the difference between media and non-media defendants. In finding that the petitioners were public figures, the trial court adopted the

position that a private libel defendant is the same as a media defendant.

The courts below held that petitioners were public figures and a public controversy is involved. They simply ignored *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), which held that all judicial proceedings are not public controversies. This case arose as a contractual dispute that could hardly be called a public controversy. Nor have Dr. Rahn or Novecon achieved celebrity status. It stretches the imagination to label this lawsuit a public dispute of significant importance. The views of a columnist writing in the European edition of the *Wall Street Journal* do not raise the issue to that level since the thrust of the article was mismanagement by U.S. Government provided funds by BAEF. Novecon is in much the same situation as the defamed party in *Gertz v. Welch*, 418 U.S. 323 (1974).

The petitioners were injected into this controversy over the Rushford article (J.A. 417), which focused on mismanagement of U.S. Government funds and oversight by the U.S. Agency for International Development. The article was entitled "AID's Boondoggle in Bulgaria." It tangentially discussed this lawsuit. Dr. Rahn did not pay Rushford to write the article (J.A. 200). Neither Rushford nor the *Wall Street Journal* are parties in this action. It is solely between private parties.

News media cases invoke the "free press" provisions of the First Amendment. That is the underpinning for *New York Times v. Sullivan*, 376 U.S. 254 (1864). There is no chilling of news reporting in this case. What exists in this case is the granting of a "free speech card" to one who committed a private libel.

In *Swengler v. ITT Corporation*, 993 F.2d. 1063 (4th Cir. 1993) the court rejected the argument that ITT was a public figure in a non-media case. If an international corporation like ITT is not a public figure certainly Novecon is not a public figure. No great public debate revolved around Novecon's case against BAEF. The letter written by Dr. Rahn to Congressman Livingston certainly did not engender a great public debate. That was also two months before Bauer and Schiller wrote their 570 letters. The two events are not connected (App. p. A-7). Novecon did not inject itself into a public controversy. The decision in this case conflicts with *Swengler* creating a conflict in the circuits.

2. The District Court held that the plaintiffs failed to carry their burden of proving actual malice and granted summary judgment to defendants. (App. p. A-63). The Court of Appeals affirmed. (App. p. A-20). Important issues are raised under the Seventh Amendment and Rule 56 of the Federal Rules of Civil Procedure. How far may a trial court go in weighing the evidence to determine whether there is sufficient evidence of actual malice to submit it to a jury? At what point does the trial court invade the province of the jury in deciding a motion for summary judgment? There must be a line of demarcation beyond which a trial court may not go in deciding which facts carry the weight of deciding whether malice is sufficient for the jury to consider.

Assuming *arguendo* that Dr. Rahn and the Novecon companies are public figures then they must prove actual malice. In this case the sending of 570 letters repeating the lie is sufficient evidence from which a jury could infer malice.

The District Court in its September 16 opinion (App. p. A-66) held that the language "extortion" and "Brooklyn

Bridge" were "rhetorical hyperbole" (JA 48). That is an invasion of the province of the jury. The District Court weighed the language and determined it was not libel. That violates not only Rule 56 but the Seventh Amendment right to a jury trial. To falsely accuse an innocent person of extortion is a libel under the common law. All the nuances imaginable do not eliminate that fact. The defendants set out to destroy the reputation of the plaintiffs in Bulgaria and succeeded. It was for a jury to determine whether the language was punishable with a malicious intent.

Accusing one of trying to extort money and selling the Brooklyn Bridge is defamatory on its face. In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), the Court of Appeals found accusing one of a crime was enough to send it to the jury. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) the Court found that labeling a person a perjurer was enough. Chief Justice Rehnquist speaking for the Court in *Milkovich* said: "The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements... imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." He went on to say, "We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false." 497 U.S. at 21. The statements in the letter accusing Plaintiffs of trying to "extort" money and sell them the "Brooklyn Bridge" contain sufficient factual connotations to imply that Plaintiffs engaged in fraud and deceit. That connotation had a disastrous effect on a business entity trying to establish its credibility in an evolving marketplace. As noted by the *Milkovich* Court, one cannot simply characterize such statements as hyperbole. The Court of Appeals substitutes its judgment for that of a jury in determining whether the defendant acted in bad faith and with a malicious intent.

The Court of Appeals in its opinion states, "... the Court looks to the primary motive by which the defendant is apparently inspired." (App. p. A-19). The Court of Appeals then on (app. p. A-25) cites the defendant Bauer's affidavit as to whom the letters were sent and the reason. The plaintiffs, however, were denied the right to test the credibility of Bauer's affidavit by deposition because the trial court stayed discovery. The Court of Appeals however relied upon the Bauer evidence that had not been subjected to cross-examination to determine defendants' motive. Both Novecon, a private entity, and BAEF, a U.S. Government funded entity, were vying for business credibility in Bulgaria and competing for approval by the U.S. State Department in aiding the Bulgarians in an economic revival. BAEF's motives however could not be illuminated. Cross-examination has the purpose of gaining insight into the affiants' motives. Acceptance of the Bauer assertions without cross-examination violates the very core of Rule 56, F.R.C.P., on summary judgment. The Court viewed the evidence in a light most favorable to the movant. That is contrary to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 31 (1986), which held that the evidence must be viewed in a light most favorable to the non-moving party.

The Court's acceptance of Bauer's statements in his affidavit becomes a finding of fact relied upon by the trial court and the Court of Appeals. The result is an expansion of Rule 56. What it means is that a trial court may rely upon a challenged affidavit without permitting the non-moving party to cross-examine the affiant to test its credibility. This becomes trial by affidavit. The Court of Appeals noted that plaintiffs sought discovery to ascertain the names of the recipients of the letter (App. p. A-26) but upheld the holding of the district court that disclosure by the defendant of the categories of recipients was sufficient. In other words the

statements of defendants were accepted as true and no further inquiry was necessary. The district court therefore acted on an incomplete record. This is the denial of a fundamental right to fairness. Summary judgment cannot be used as a substitute for a fact finding inquiry as was done in the case at bar or on an incomplete record.

If Rule 56 is not violated in this case then there has been an intrusion into the province of the jury in violation of the Seventh Amendment to the Constitution. The Seventh Amendment guarantees the right to a jury trial in civil cases. Summary judgment cannot be used as a substitute for trial by jury. Yet in this case that is what occurred.

The determination of malice in this case was for a jury. It was for a jury to determine whether referring to the petitioners as extortionists was so excessive, intemperate and abusive as to constitute malice. The Court of Appeals and the District Court referred to this as hyperbole, but it is not for the courts to determine hyperbole. That is a jury question.

The Seventh Amendment has not only a procedural content but a substantive one as well. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 346 (dissenting opinion) (1978). As pointed out in *Beacon Theatres v. Westover*, 359 U.S. 500, 510, n. 16 (1959), when Congress delegated responsibility for drawing up rules it was the intent that they not infringe the Seventh Amendment.

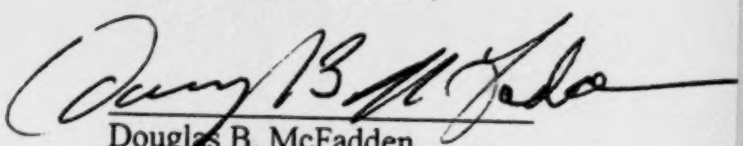
The fundamental right to a jury trial guaranteed by the Seventh Amendment is at issue in this case. This case presents this Court with the opportunity to examine the relationship between summary judgment and the Seventh Amendment. Without such an examination, trial judges can

be expected to continue to expand their analysis of the evidence to such a degree as to usurp the jury's function. The right to a jury trial is too important to be ignored.

CONCLUSION

WHEREFORE, petitioners, for the foregoing reasons, pray this Court issue a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully Submitted,



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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 1, 1998 Decided September 3, 1999

No. 97-7178

NOVECON LTD., NOVECON MANAGEMENT COMPANY, AND RICHARD W. RAHN,
APPELLANTS

v.

BULGARIAN-AMERICAN ENTERPRISE FUND, FRANK L. BAUER, AND NANCY L. SCHILLER,
APPELLEES/CROSS-APPELLANT

Consolidated with
97-7182

Appeals from the United States District Court
For the District of Columbia
(No. 95cv01178)

Douglas B. McFadden, argued the cause for appellants. With him on the briefs was *John M. Shoreman*.

Bills of costs must be filed within 14 days after entry of the judgment. The court looks with disfavor upon motions to fill bills of costs out of time.

Anson M. Keller argued the cause for the appellees/cross-appellant. With him on the briefs was *Gary H. Baise*.

Before: WALD, SILBERMAN and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: The plaintiffs brought this diversity action charging breach of contract and defamation in connection with a failed real estate venture in Sofia, Bulgaria. The district court granted summary judgment in favor of defendants on both the contract and defamation claims. For the reasons stated below, we affirm the judgment of the district court.

I

Plaintiffs Novecon, Ltd. and Novecon Management Company ("Novecon") are private firms engaged in developing business projects in Bulgaria, primarily through the use of joint ventures. Plaintiff Richard Rahn is president of both companies; Ronald Utt is their managing director. Defendant Bulgarian-American Enterprise Fund (BEAF or "the Fund") is a not-for-profit corporation established pursuant to the Support for East European Democracy Act, 22 U.S.C. §§ 5402, 5421. It promotes private sector development and entrepreneurship in Bulgaria through, among other things, grants, loans, and equity investments. Defendant Frank Bauer is the Fund's president and defendant Nancy Schiller is the managing director of the Chicago office.

A

In 1991, Novecon formed a joint venture with a Bulgarian company to develop a residential and commercial building complex in Sofia, on land owned by the Batsov family.[1] In November 1992, it began negotiating with the Batsovs to transfer title to the land in exchange for a percentage of the projects finished units. Novecon also contracted BAEF and proposed that the Fund provide a construction loan to finance the development of the project. In March 1993, BAEF sent Novecon a letter indicating that the Fund's board of directors had "authorized continued conversations surrounding several real estate projects," including Novecon's. Joint Appendix ("J.A.") 144.

Between May 20 and June 3, 1993, BAEF and Novecon exchanged a series of four written communications concerning details of the project. The correspondence described the extent of Novecon's responsibilities in connection with the project, set forth a series of project milestones, and described the payments that Novecon would receive upon the completion of each milestone. The correspondence contemplated that the Batsov family would have a 26 percent stake in the building complex. Novecon contends that these four documents created a contract which bound BAEF to provide financing for the project.

---

[1] Novecon formed the joint venture, known as Southern Park Development, with Mirpex Co., a Bulgarian limited liability company. Southern Park Development has assigned its rights in this litigation to Novecon. Utt Aff. ¶ 76 (Joint Appendix ("J.A.") 76), and we refer tot he joint venture as "Novecon" for ease of reference.

The first letter, from Nancy Schiller of BAEF to Ronald Utt of Novecon, was written on May 20, 1993. J.A. 145. It stated that the Fund was "prepared to move forward on the terms outlined in this letter." The letter then described a "narrower oversight role" for Novecon than previously anticipated, listed a series of responsibilities that BAEF contemplated for Novecon, and noted that "this list is not exhaustive [but] should provide an overview of the role that [Novecon] will have." Schiller stated that"[c]ontingent on the signing of a definitive agreement," the Fund was willing to compensate Novecon with the sum of $200,000, "with payment based on timing and project landmarks." The first installment, of $25,000, would be made "[u]pon completion of: a) Contract signing, b) Delivery of unencumbered land title for Phase I and II, c) Transfer of the land title, [and] d) Securing and delivery of the zoning amendment." Schiller further stated that she and Mr. Batsov had agreed that the family would receive 26 percent of the building's apartments. She noted that "this document is fairly comprehensive, but undoubtedly there will be some need to clarify certain points now or as we proceed." Finally, Schiller said that the offer made in the letter would expire on June 4, 1993. *Id.*

On June 1, 1993, Utt sent Schiller a telefax reflecting their telephone conversation of the previous Friday. J.A. 148-9. The fax noted that Schiller had asked Novecon to revise the milestones "to advance the project and conform to Bulgarian law." Novecon's fax contained the revised milestones, as well as a series of revised fees, which Utt said he had "redone... to better reflect the degree of difficulty in accomplishing the required tasks." He closed by stating that he "looked forward to [BAEF's] response." *Id.* at 149.

On June 3, 1993, Schiller sent Utt a revised fee structure which, she said, would be included "in our request to the Fund's Board for final approval" of the project. J.A. 150. Her letter stated, however, that "[o]ne important new issue has come up." Although BAEF had previously been told that Mr. Batsov represented all the heirs to the property, Ms. Lilyana Batsova and two relatives had just notified BAEF that they had an ownership interest and that Mr. Batsov did not represent them. "[I]f this is the case," Schiller said, "I am sure you realize that the BAEF will not pursue this investment." In light of these developments, Schiller said that BAEF "will consent to extending our negotiations until June 15, 1993 by which time we will expect certified documentation of the sign off of all heirs." If evidence is not received by that date, she said, "BAEF will rescind its offer to negotiate and terminate its discussions with [Novecon]." *Id.*

The last of the four communications was a two-paragraph telefax sent by Utt to Schiller on June 3, 1993. J.A. 152. "On behalf of [Novecon]," he wrote, "I accept the terms of the Fund's 20 may 1993 offer and the revised fee schedule. I also understand that your offer is contingent upon a resolution of any and all outstanding uncertainties regarding ownership of [the building] sites, and accept the responsibility to resolve the uncertainties to the Fund's satisfaction by the 15 June 1993 deadline." Novecon contends that by accepting the terms of the Fund's May 20th letter and June 3rd revised fee schedule, this telefax "creat[ed] a binding contract." Am. Compl. 17.

On June 14, 1993, Schiller telephoned Utt and requested that he renegotiate the arrangement with the Batsov family to reduce their share in the project from 26 percent to 12 percent. To give Novecon time to negotiate, BAEF extended its deadline to June 28. On that date,

however, Novecon advised BAEF that the Batsovs had refused to reduce their share. Novecon sought BAEF's "guidance as to how... to proceed," and offered to "extend the period of time during which we will not solicit other investors while you attempt to work this out." J.A. 157-59.

Finally, on November 2, 1993, BAEF wrote Novecon that "since our agreement to negotiate the project expired on June 28, 1993, we have decided to terminate negotiations." J.A. 160. The letter noted that the local court in Sofia had delayed judgment on Lilyana Batsova's property claim, that BAEF had not received a contract signed by the Batsov family agreeing to turn over the property, and that numerous zoning issues regarding the land remained unresolved. "Basically," BAEF wrote, "the project has proven unfeasible." *Id.*

In June 1995, Novecon (and Rahn) filed suit in the United States District Court for the District of Columbia, asserting jurisdiction based on the diversity of the parties' citizenship. The complaint alleged three contract-related claims: breach of contract, promissory estoppel, and quantum meruit. It contend4ed that by accepting the terms of the Fund's May 20th letter and June 3rd revised fee schedule, Novecon's June 3rd telefax created a binding contract, and that the Fund's insistence on renegotiating the Batsov family's share breached the contract and caused the project to collapse.

B

The second phase of the case, culminating in the filing of an amended complaint for defamation, began soon after Novecon its original contract action. In October of 1995, BAEF received a two-page document which, it was told, Richard Rahn of Novecon had given to the American

Ambassador to Bulgaria. BAEF constructed the document as a draft for publication. Bauer Aff. ¶ 77 (J.A. 464). The document generally attacked BAEF, and contended that "[a]llegations of conflict of interest and theft of project ideas by individuals close to the senior staff have been made." J.A. 525-26. It then proffered the "example of... the Novecon company." According to the document, "[a]fter signing the contract with Novecon," BAEF "proceeded to change the project so that Novecon with its partners could no longer obtain the necessary agreements and approvals in Bulgaria... [and] then refused to compensate Novecon for losing the project." Moreover, it said, "Dr. Rahn has been told that the BAEF strategy is to bleed Novecon with legal bills because the BAEF's legal cost are paid by taxpayers." The document also noted that "Rahn has written member of Congress requesting hearings and an investigation" of the Fund. *Id.* at 526.

In November of 1995, Rahn did send letters to members of Congress, on Novecon stationary. J.A. 529-30. In those letters, he wrote that "[t]here is considerable evidence that [BAEF] has abused its fiduciary responsibility with taxpayer money...; does not have competent management; has conducted its activities in such a way as to give the appearance, if not the fact, of a conflict of interest...; has acted in a manage damaging to legitimate U.S. businesses; and has damaged U.S. Bulgarian relations." Rahn offered the Novecon case as an example, stating, in word paralleling the October draft discussed above, that "[a]fter signing the contract with Novecon... the BAEF then proceeded to change the project so dramatically from the approved plans that the necessary agreements and approvals in Bulgaria could no longer be obtained." BAEF then "refused to do the appropriate and honorable thing-compensate Novecon" for its losses. The letter further contended that BAEF's "strategy is to bleed

Novecon with legal bills because BAEF's legal costs are paid by the taxpayers." And it specifically charged that "just last week the BAEF brought four lawyers... to a hearing in Washington in another successful attempt on their part to have our case dismissed on technicalities." In closing, Rahn accused BAEF of "incompetence and arrogance" and "mismanagement or worse," and argued a congressional investigation. *Id.*

On January 5-6, 1996, the *Wall Street Journal Europe* published an op-ed piece by an author named Greg Rushford, entitled "AID's Boondoggle in Bulgaria." J.A. 291. The Rushford piece made several of charges contained in the October draft and the November Rahn letter. It accused BAEF of "arrogance" and "shoddy performance," stemming "largely from a management cadre who spent most of their time drawing big salaries in comfortable offices." Four paragraphs of the article discussed the dispute between BAEF and Novecon. It noted that "Mr. Rahn, a respected former chief economist at the U.S. Chamber of Commerce, accuses the BAEF of breaching a contract to fund a residential and commercial real estate project in Sofia... [by] constantly trying to alter the deal's terms until they caused the project to collapse." The article quoted Ronald Utt, Novecon's managing director, as stating that "[w]e could have gotten a perfectly suitable Bulgarian architect for $15,000, but BAEF decided they wanted a Chicago architect," and that BAEF was "in over their heads." It charged that "armed with tax dollars, [BAEF was] busy employing petty litigation tactics against Novecon." And it specifically charged-as had the federal court to fight over dubious claims about standing and venue." *Id.*

On January 15, 1996, the Bulgaria newspaper *24 hours* ran twos stories related to the BAEF-Novecon

dispute. See J.A. 785-89 (translations). The first discussed the Rushford article's analysis of BAEF's financial excesses and poor performance. In that article, the reporter note that BAEF "became notorious for the big salaries of its employees, the fancy offices in Chicago and the $200,000 that the 'Novecon' owner, Richard Rahn, lost in a deal with the Fund." The second article focused specifically on the Novecon litigation as reported by Rushford. It repeated Rahn's claim that BAEF frustrated the parties' agreement by repeatedly trying to alter the terms of the project. It also repeated Utt's contention that BAEF had insisted that the architect be American. The article concluded by noting that Rushford believed it was not worth hiring expensive lawyers for a $200,000 case, and that BAEF's strategy was to cause delays and large court expenses. *Id.*

Immediately after receiving the op-ed piece, BAEF sent the *Wall Street Journal Europe* a letter responding to Rushford's allegations. The *Journal* published the response as a letter to the editor on January 16, 1996. J.A. 796. BAEF's letter set forth several assertedly factual inaccuracies about BAEF contained in the Rushford article. Its sole reference to Rahn and Novecon appeared in the final two sentences: "Richard Rahn, whose lawsuit against us receives excessive attention in the article, is entitled to and will have his day in court. It is unfortunate that the *Wall Street Journal Europe* has been used as a forum to buttress an otherwise meritless complaint." *Id.*

Thereafter, on January 18, 1996, BAEF sent a package of materials to 570 individuals and organizations in the United States and Bulgaria. The package sent to Americans contained the Rushford article and BAEF's letter to the editor; the Bulgarians received a copy of the *24 Hours* article as well. Th cover letter, which is the focus of Novecon's defamation claims, stated in relevant part:

> We find it odd that Mr. Rushford would choose to write about the Bulgarian-American Enterprise Fund, and then devote nearly one-third of his opinion piece to a lawsuit that Dr. Richard Rahn on behalf of a Washington, D.C. firm called Novecon. Dr. Rahn, through Novecon, seeks to extort $200,000 of U.S taxpayer money from the BAEF as a fee for a real estate project that the BAEF rejected because it turned out to be a veritable "Brooklyn Bridge" of misrepresentation. Among other problems, Novecon's client did not own the land on which the project was to be developed-despite representations by Novecon to the contrary. Since there was nothing to sell, we did not buy their "Brooklyn Bridge."

J.A. 169.[2]

Following the circulation of the BAEF letter, Novecon and Rahn amended their complaint to add a charge of defamation focusing particularly on the allegations that they had sought to "extort $200,00 of taxpayer money," and that the project was a "veritable Brooklyn Bridge of misrepresentations." Am. Compl. ¶ 33 (J.A. 359); *see* Rahn Reply Aff. ¶ ¶ A, B (J.A. 295).

C

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[2] According to BAEF, the letters delivered to the American and Bulgarian recipients were largely identical, with the exception of the Brooklyn Bridge reference which was omitted from the letters to the Bulgarians because it would not have been understood. *See* J.A. 795.

The district court issued three opinions which together granted summary judgment against Novecon and Rahn on all counts. In the first opinion, the district court granted summary judgment on the contract claims. *Novecon v. BAEF ("Novecon I")*, 967 F. Supp. 1382 (D.D.C. 1997). The court held that the letters exchanged by Novecon and BAEF were insufficient to allow a reasonable trier of fact to find a contract between the parties, and rejected Novecon's alternative argument that it was entitled to damages on theories of promissory estoppel or quantum meruit. The court concluded: "[T]he record is clear that BAEF extended only an 'offer *to negotiate*' which Novecon 'accepted'... [and which] constitutes nothing more than an agreement to continue negotiations... Novecon cannot enforce any binding. Legal obligations against BAEF." *Id.* at 1389.

In its first and second opinions, the district court also granted summary judgment against plaintiffs' defamation claim, for two reasons. The court held that BAEF's letters were entitled to First Amendment protection because plaintiffs were "limited-purpose public figures" and had failed to show defendants had acted with the kind of malice necessary to overcome the constitutional privilege. *Novecon v. Bulgarian-American Enterprise Fund ("Novecon II")*, 977 F. Supp. 45, 49 (D.D.C. 1997); *Novecon I*, 967 F. Supp. At 1390 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).[3] The court also held that BAEF's letters were protected by the common-law privilege of self-defense, and that BAEF had failed to show defendants had acted with the kind of malice necessary to overcome that privilege. *Novecon II*, 977 F. Supp. at 49-

[3] In *Novecon I* the court found only Rahn to be a limited-purpose public figure. *See* 967 F. Supp. at 1390-91. In *Novecon II* it found Novecon to be one as well. *See* 977 F. Supp. at 49.

52. Finally, in its third opinion, the court rejected plaintiff's motion under Fed. R. Civ. P. 56(f) to deny or stay summary judgment in order to permit Novecon to obtain additional discovery. *Novecon v. Bulgarian-American Enterprise Fund* ("*Novecon III*"), 977 F. Supp. 52, 53-54 (D.D.C. 1997).

II

We begin with plaintiffs' contract-related claims. We review the district court's grant of summary judgment *de novo*. *Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77,79 (D.C. Cir. 1998). We may uphold that grant only if "no reasonable fact-finder could conclude that an enforceable" contract existed between the parties. *Jack Baker, Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236, 1241 (D.C. 1995); *see Ekedahl v. COREStaff, Inc.*, No. 98-7119, 1999 EL 550970 (D.C. Cir. July 30, 1999), ___ F.3d ___, at *2-3.

A

Under the law of the District of Columbia, "for an enforceable contract to exist there must be both (1) agreement as to all material terms; and (2) intention of the parties to be bound." *Jack Baker*, 664 A.2d at 1238. The party asserting the existence of an enforceable contract bears the burden of proof on the issue of contract formation. *See id.*; *Ekedahl*, 1999WL 550970 at *3. "Where the parties contemplate a subsequent written contract, this burden is particularly onerous." *Jack Baker*, 664 A.2d at 1238.

Plaintiffs contend that the four corners of the contract between Novecon and BAEF may be found in the four communities the parties exchanged between May 20th

and June 3, 1993. Novecon Br. At 18. Specifically, Novecon contends that by accepting the terms of the Fund's May 20th letter and June 3rd revised fee schedule, Novecon's June 3rd telefax "creat[ed] a binding contract." Am Compl.¶ 17 (J.A. 354); Utt Aff. ¶ 23 (J.A. 76).[4] Having searched those four corners, we do not find a contract within them.

Novecon's first letter, dated May 2, 1993, stated that the terms it contained provided an "overview" but were not "exhaustive," and that "undoubtedly there will be some need to clarify certain points now or as we proceed." J.A. 146-47. The first payment would be made, the letter said, only "[u]pon completion of: a) Contract signing, b) Delivery of unencumbered land title for Phase I and II, c) Transfer of the land title, [and] d) Securing and delivery of the zoning amendment." The Fund's willingness to compensate Novecon, it stressed, was "[c]ontingent on the signing of a definitive agreement." *Id.*

BAEF's second letter, dated June 3, 1993, was no more definitive. *See* J.A. 150-51. First, it said that a "revised fee structure" would be "include[d] in our request to the Fund's Board for final approval," thus indicating that there was at least one more stage required before BAEF could enter into a contract. Second, BAEF made clear that its offer would be rescinded unless it received "certified documentation of the sign off of all [Batsov] heirs by June 15, 1993." Finally, and most significant, BAEF expressly characterized its offer as an "offer to negotiate." *Id.*

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[4] The remaining communication, the June 1st fax from Novecon to BAEF, proposed a revised fee schedule originally contained in the Fund's May 20th letter. J.A. 148-49.

In light of the plain language of these letters, and BAEF's own characterization of its offer, we agree with the district court's conclusion that "BAEF extended only an 'offer *to negotiate*,'" and that when Novecon accepted that offer on June 3rd it created "nothing more than an agreement to continue negotiations." 967 F. Supp. at 1389; *see generally Bender v. Design Store Corp.*, 404 A.2d 194, (D.C. 1979) ("All that was promised was that appellee would bargain in good faith."). The letters made clear that they did not contain all terms material to an agreement, and that those terms would be contained in a "definitive agreement" to be finalized at the "contract signing" expressly contemplated in the May 20th letter. *See* 967 F. Supp. at 1387. In the District of Columbia, "parties will not be bound to a preliminary agreement unless evidence presented clearly indicates that they intended to be bound at that point." *Jack Baker*, 664 A.2d at 1239. There is no such evidence here.

There are other significant indications of nonfinality as well. One is the June 3rd letter's reference to the fact that the terms would have to be submitted to the Board for "final approval." *See Jack Baker*, 664 A.2d at 1237, 1241 (describing requirement that Philippine embassy construction contract "will be subject to the approval of the Philippine Department of Foreign Affairs" as "striking" indication of nonfinality). A second is that this was the sort of complex, expensive, multi-stage transaction in which a subsequent formal contract would ordinarily be expected. *See id.* at 1240-41; *see also R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984).

Finally, BAEF's letter made clear that there were a number of key contingencies that would have to be satisfied before the agreement could be concluded. First among these was the transmission of "certified

documentation of the sign off of all [Batsov] heirs." J.A. 151. Indeed, in accepting "the terms of the Fund's" offer on June 3rd, Novecon acknowledged its understanding that agreement was "contingent upon a resolution of any and all outstanding uncertainties regarding ownership of [the building] sites," and "accept[ed] the responsibility to resolve the uncertainties to the Fund's satisfaction by the 15 June 1993 deadline." *Id.* at 152. Yet, as Novecon notes in its brief, those uncertainties were never resolved. Novecon Br. at 24.

In sum, we agree with the district court that no reasonable trier of fact could conclude that the exchange of communications between Novecon and BAEF constituted an agreement by both parties to be bound by their terms. Rather, the letters were "merely a part of preliminary negotiations looking toward the execution of a contract in writing by [their] own terms negate[d] the idea that [they] were intended as an offer which thereafter could be accepted... without the necessity of a formal written document covering all the terms." *Simplicio v. National Scientific Personnel Bureau, Inc.*, 180 A.2d 500, 502 (D.C. 1962).

B

As an alternative to its breach of contract claim, Novecon contends that it is entitled to relief on either of two related theories: promissory estoppel or quantum meruit. The core requirements of those theories, however, are absent here.

Novecon argues that it "reasonably relied to [its] detriment on the Fund's promises to provide" funding for the project, and that in reliance on those promises it "expended considerable amounts of time and money." Am. Compl. ¶ 42. Although "for purposes of estoppel, a

promise need not be as specific and definite as a contract,... in the final analysis there must be a promise to "bargain in good faith." *Bender*, 404 A.2d at 196-97. For the reason stated above, we can find no greater promise here.

Novecon also contends that it is entitled to recover on a theory of quantum meruit or unjust enrichment for the benefit it conferred on the Fund by "perform[ing] valuable services for the Fund in connection with efforts to develop" the project. Am. Compl. ¶ 45. To prevail on such a claim, a party "must show that the services [it performed] were beneficial to the recipient." *Fred Ezra Co. v. Pedas*, 682 A. 2d 173, 176 (D.C. 1996); *in re Rich*, 337 A.2d 764, 766 (D.C. 1975) ("The essential elements for recovery... [include] valuable services being rendered... for the person sought to be charged."). Novecon alleges that "[t]he benefit[s] derived by BAEF" were Novecon's "(1) meeting with the landowners to try to negotiate a different percentage of the deal and (2) meeting with Bulgarian officials to obtain zoning for the project." Novecon Br. at 25. But "a party's expenditures in preparation for performance that do not confer benefit on the other party do not give rise to a restitution interest." Restatement (Second) of Contracts § 370 cmt. a (1980); *see Richardson v. Green*, 528 A.2d 429, 438 n.12 (D.C. 1987) (holding that plaintiff may not recover if "defendant received no value"). Here there is insufficient evidence that the Fund received a valuable benefit for Novecon's unsuccessful efforts to negotiate with the Batsovs and Bulgarian officials.

III

We turn to Novecon's defamation claim, which is based on the cover letter BAEF sent to 570 individuals and organizations in the United States and Bulgaria. The letter

enclosed the *Wall Street Journal* and *24 Hours* articles, as well as BAEF's letter to the editor. The allegedly defamatory statements were the cover letter's contentions that:

> Dr. Rahn, through Novecon, seeks to extort $200,00 of U.S. taxpayer money from the BAEF rejected because it turned out to be a veritable "Brooklyn Bridge" of misrepresentation. Among other problems, Novecon's client did not own the land on which the project was to be developed-despite representations by Novecon to the contrary. Since there was nothing to sell, we do not but their "Brooklyn Bridge."

J.A. 169. The district court dismissed this claim on the basis of both First Amendment and common-law privileges. As we find the common-law privilege sufficient to sustain the dismissal, we do not address BAEF's First Amendment argument.

The District of Columbia recognizes "self defense" as a qualified privilege constituting a complete defense to a claim of libel or defamation. *See Morsie v. Trusell*, 467 A.2d 475, 477 (D.C. 1983); *Dickins v. International Bhd. of Teamsters*, 171 F.2d 21, 24 (D.C. Cir. 1948). "When the author of a libel writes... for the protection of his own rights or interests, that which is a privileged communication unless the writer be actuated by malice." *Dickins*, 171 F.2d at 24. "[T]he existence of the privilege is a question of law for the court[;] whether it was abused by the defendant, is a question of fact for the jury." *Morsie*, 467 A.2d at 477; *see Columbia First Bank v. Chatelain, Samperton & Nolan*, 374 A.2d 284, 290 (D.C. 1977).

There is no question but that the privilege applies in this case. BAEF and its management had been subjected to serious attacks in letters to Congress and articles in the press, and were privileged to respond to those attacks in self defense.[5] Thus, "the dispositive issue in this case, as in most cases involving an assertion of qualified privilege, is whether there has been sufficient evidence of malice to overcome the privilege." *Columbia First*, 665 A.2d at 656. The burden of proof to make that showing rests on the plaintiff. *Morsie*, 467 A.2d at 477; *Altimont*, 374 A.2d at 290.

District of Columbia law makes it very difficult for a plaintiff to overcome a qualified privilege. As the Court of Appeals has made clear, the common-law malice necessary to overcome the self-defense privilege is considerably different from the "actual malice" necessary to overcome the First Amendment privilege. The latter requires publication with knowledge that a statement was false or with reckless disregard as to whether it was false.

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[5] Although the District of Columbia cases do not expressly set out the requirements for coming within the protection of the self-defense privilege, they do establish the elements of the related "common interest" privilege. To be protected by that privilege, "the statement must have been (1) made in good faith, (2) on a subject in which the party communicating has an interest..., (3) to a person who has such a corresponding interest." *Moss v. Stockard*, 580 A.2d 1011, 1024 (D.C. 1990). For essentially the same reasons discussed below, those requirements are satisfied here. BAEF made the statement in the good-faith belief that it was necessary to protect the interests of the Fund from what it saw as a false and potentially damaging attack on its reputation for fair dealing, and sent it to those with either interest in or business dealings with the Fund. While "'[e]xcessive publication,' defined as publication to those with no common interest in the information communicated, or publication not reasonably calculated to protect or further the interest, will render [a] statement non-privileged," *id.*, for the reasons discussed in Part III(B), we do not find BAEF's statements to have been excessively published.

See Moss v. Stockard, 580 A.2d 1011, 1026 n.29 (D.C. 1990) (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964). Common-law malice, by contrast, "emphasize[s] bad faith and evil motive." *Id.*; *see Mosrie*, 467 A.2d at 477. It is "the doing of an act without just cause or excuse, with such conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will." *Moss*, 580 A.2d at 1025; *Mosrie*, 467 A.2d at 477. And "unless the statement itself is 'so excessive, intemperate, unreasonable, and abusive as to forbid any other reasonable conclusion than that the defendant was actuated by express malice,' malice must be proven by extrinsic evidence." *Moss*, 580 A.2d at 1024 (quoting *Ford Motor Credit Co. v. Holland*, 367 A.2d 1311, 1314 (D.C. 1977); *see Columbia First*, 665 A.2d at 656.

Moreover, "the mere existence of ill will on the part of the publisher toward the subject of the publication does not defeat the publisher's privilege if the privilege is otherwise established by the occasion and a proper purpose." *Mosrie*, 467 A.2d at 477. Rather, the "court looks to the primary motive by which the defendant is apparently inspired; and, the fact that he feels resentment and indignation towards the plaintiff and enjoys defaming him will not forfeit the privilege so long as the primary purpose is to further the interest which is entitled to protection." *Id.*, at 477-78; *see Columbia First*, 665 A.2d at 656. Most significantly,

> If the language of the communication and the circumstances attending its publication by the defendant are as consistent with the nonexistence of malice as with its existence, there is no issue for the jury, and it is the

> duty of the trial court to direct a verdict for the defendant.

Mosrie, 467 A.2d at 478 (quoting *National Disabled Soldiers' League, Inc. v. Hann*, 4 F.2d 436, 441-42 (D.C. 1925); *see Altimont*, 374 A.2d at 291; *Dickins*, 171 F.2d at 25.

A

In this case we cannot deduce the necessary malice from BAEF's words alone. To be sure, the Fund's description of the Novecon lawsuit as an attempt "to extort $200,000 of U.S. taxpayer money from BAEF," and its description of the problems over land title as "a veritable 'Brooklyn Bridge' of misrepresentation," were harsh and intemperate. But we cannot say that the statement was "'so excessive , intemperate, unreasonable, and abusive as to forbid any other reasonable conclusion than that the defendant was actuated by express malice.'" *Moss*, 580 A.2d at 1024 (quoting *Ford Motor*, 367 A.2d at 1314).

We cannot say particularly because the statements the District of Columbia Court of Appeals found protected by the self-defense privilege in *Mosrie v. Trussell* were at least as harsh and intemperate as those at issue here. In this case, the *Washington Post* had reported a series of complaints of incompetence and racism against Trussell, the Deputy Chief of the Metropolitan Police Department, made by members of the Homicide Branch. The Chief of Police asked Trussell to respond to the complaints. Trussell responded by making allegedly defamatory statements about Morsie, the commander of the Homicide Branch, whom he suspected of being the source of the *Washington Post* article. Specifically, these statements included Trussell suspicion that Mosrie was:

> manipulating his pay records, running his outside businesses on police time, using his police cruiser for personal business; and that he was often absent from work, did not respond to investigations after normal working hours and was not adequately informed as to homicide investigation.

Mosrie, 467 A.2d at 477. Notwithstanding the court's description of these statements as "alleged dereliction of duty and possible criminal abuses," the court concluded that "[a]ny finding of malice would be based only on speculation, which is not sufficient to send the issue to jury." *Id.* at 478. "Mere vehemence, even exaggerated statements... will not," the court observed, "destroy the privilege or necessarily present a question of fact." *Id.* at 479 (quotation omitted). Moreover, notwithstanding, that plaintiff had shown "evidence that Trussell's communications were inspired by resentment and indignation at Mosrie," the court held, he was still "privileged to explain to... the Chief his opinion as to the motivations behind the list of complaints against him." *Id.* Because "at most, the evidence [was] as consistent with the nonexistence of malice on the part of Trussell toward Mosrie as it [was] with the existence," the court concluded that a directed verdict against the plaintiff was in order. *Id.* at 480.

Although BAEF's characterization of Novecon as attempting to "extort" taxpayer money and to sell it the "Brooklyn Bridge" was harsh, it was no harsher that Trussell's leveling of charges of criminal abuses" against another police officer. While Novecon contends that the reader would interpret BAEF's letter as literally charging it with it a crime (extortion), we think that unlikely. The context of the statement, which was contained in a cover

letter to a package of material including the original *Wall Street Journal* article, made clear to the reader that the reference was to Novecon's civil lawsuit and not to some nefarious scheme. Such usage is perfectly consistent with dictionary definitions of "extort." *See, e.g.,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 806 (1986) (defining extort as "to obtain from an unwilling or reluctant person by importunity, argument or ingenuity...<she did at last [extort] from her father an acknowledgement that the horses were engaged-Jane Austen>").

Indeed, the statement at issue here is quite close to that considered by the Supreme Court in *Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6 (1970). There, a developer was accused of "Blackmail[ing]" the city council to obtain a zoning variance by simultaneously negotiating to sell the city a piece of desirable real estate. "It is simply impossible to believe," the Court said, "that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's [the developer's] public and wholly legal negotiating proposals that were being criticized." *Id.* at 14. The court continued:

> No reader could have thought that [the defendants] were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

Id.

As with the use of "blackmail" in *Greenbelt*, here the word "extort" was used as "a vigorous epithet" by "those who considered" Novecon's litigating position "extremely unreasonable." And there can be no question that BAEF actually believed that Novecon's litigating position-its claims that BAEF had breached a binding contract and so should pay it $200,000-was unreasonable. BAEF vigorously defended itself against Novecon's contract claim in the district court, and we have upheld that defense. Accordingly, we cannot find that BAEF's choice of epithets "'forbid[s] any other reasonable conclusion that that the defendant was actuated by express malice.'" *Moss*, 580 A.2d at 1024 (quoting F*ord Motor*, 367 A.2d at 1314).[6]

B

As BAEF's statement is insufficient on its own to establish malice, Novecon must prove malice "by extrinsic evidence." *Moss*, 580 A.2d at 1024 (quoting *Ford motor*, 367 A.2d at 1314). Having no direct extrinsic evidence of ill will on the part of BAEF, Novecon turns to circumstantial evidence.

The first piece of circumstantial evidence offered by Novecon is the fact that "defendants made their defamatory attack on plaintiffs for statements made by a third party." Novecon Br. at 14. "Neither Novecon nor Dr. Rahn," plaintiffs contend, "were the sources of the Rushford article." Hence, the "counter attack was against the wrong

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[6] We reach the same conclusion with respect to the use of the "Brooklyn Bridge" metaphor to describe, inter alia, the dispute over the Batsovs' title to the property. As the district court found, the term was "a figure of speech the reflected the defendant's assessment of Novecon's contract offer, obviously subject to many debatable interpretations." *Novecon II*, 977 F. Supp. at 51.

party."[7] *Id.* But Novecon sites no case for the proposition that the self-defense privilege may be wielded only where the plaintiff is the known attacker. Since the attacks specifically referred to the Novecon matter-as an example of BAEF's "arrogance," "shoddy performance," or worse-any reply would have had to respond to the charges concerning BAEF's dealings with Novecon, regardless of the source of those allegations.

Moreover, M*osrie* suggests that the privilege is not limited to replies to known attackers. Although Trussell "suspected" Mosrie of being the source of the critical *Washington Post* article, Mosrie apparently was not named in the article. Here, BAEF certainly suspected that Novecon and Rahn were sources for Rushford's *Wall Street Journal* article. Regardless whether that was true, the suspicion was not unreasonable in light of the parallels between the article's charges and those contained in both Rahn's letter to Congress and the two-page draft the American Ambassador gave to BAEF. In addition, Ronald Utt, Novecon's managing director, was quoted by name in the Rushford article. Under District of Columbia law, BAEF was therefore "privileged to explain... [its] opinion as to the motivations behind the list of complaints against" it. *Mosrie , 467* A.2d at 480. It "had the right to repel attack... and to retort upon its assailant if such retort was a necessary part of its defense or fairly arose out of that charges made against" it. *Id.* at 479 (quotation omitted).

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[7] Plaintiffs do not dispute that Rahn was the author of the letter sent to members of Congress. At oral argument they suggested that the letter could not trigger a right of reply because Rahn had the right to petition Congress. Yet, even if that right would have given Rahn his own privilege in the event BAEF had sued him for defamation, plaintiffs cite no case for the proposition that the fact an attack is communicated to Congress deprives a citizen of the common-law privilege of self-defense.

Novecon's second piece of circumstantial evidence of malice is the fact that BAEF sent its letter to 570 people in the United States and Bulgaria. Novecon contends that this response was so disproportionate as to be "alone sufficient evidence to support a jury inference of malice." Novecon Br. at 17. BAEF's single letter to the editor of the *Wall Street Journal*, Novecon notes, was a measured response. The 570 letters, however, assertedly took the response outside the scope of the privilege.

The district court disagreed, as do we. As the court said, "the common law qualified privilege asserted here does not demand that defendants demonstrate failsafe precision in identifying third parties with a sufficient interest in BAEF's public controversy." 977 F. Supp. at 50.[8] BAEF sent its letter to "U.S. government agencies, Bulgarian officials, and actual and potential business relations within the Bulgarian private sector." *Id.* at 49. Specifically, the Fund "attempted to reach persons whose opinions of BAEF were, or reasonably could have been affected by plaintiffs' comments and the ensuing wave of negative publicity." *Id.* at 50. Approximately five hundred of the letters went to Bulgaria, with all but a handful of those going to borrowers from the fund. Bauer Aff. ¶ 91

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[8] The Restatement (Second) of Torts states:

> If on an occasion giving rise to a conditional privilege the publisher mistakenly communicates the defamatory matter to some person to whom he is not otherwise privileged to publish it, he is protected if... he reasonably believes that the person to who he communicated it is a person whose knowledge of the matter would be useful in the protection of the interests in question.

Restatement (Second) of Torts § 604 cmt. e (1977) (quoted in *Novecon II*, 977 F. Supp. at 50.

(J.A. 472); Schiller Aff. ¶ 59 (J.A. 726). BAEF could not limit itself to readers of the *Wall Street Journal*, because the Rushford article had been republished in the Bulgarian press and Novecon had sent its own letters directly to members of Congress. As the district court explained, "defendants mailing to several hundred addresses must be viewed in light of the negative press coverage BAEF received in Bulgarian and international newspapers, reaching tens of thousands of readers." 977 F. Supp. at 55-56. *Compare Dickins*, 171 F.2d at 23-25 (finding no showing of malice where Teamsters' union responded to critical newspaper articles by attacking critics in teamsters magazine sent to "400,000 Teamsters and about 1,200 others, including all members of Congress, a number of colleges, libraries, newspapers and other periodicals").

Finally, we reject Novecon's assertion that the district court improperly denied its request for discovery, under Federal Rule of Civil Procedure 56(f), of the names of the 570 recipients of BAEF's letter. We review such claims under an abuse discretion standard. *See Paquin v. Federal Nat'l Mortgage Assoc.*, 119 F.3d 23, 28 (D.C. Cir. 1997). Plaintiffs' principal argument is that the names could have shown "that BAEF's letter may have reached too broad an audience to constitute a reasonable defense of its reputation." *Novecon II*, 977 F. Supp. At 55. But as the district court noted, BAEF did disclose the categories of recipients (e.g., member of Congress, borrowers from the Fund, etc.) *Id.* at 56. Given that level of disclosure, and the leeway a defendant has to determine those whom it must reasonably communicate its response, we cannot dispute the district court's conclusion that production of the names was not-as required by Rule 56(f)-"essential to justify [Novecon's] opposition" to summary judgment. *Id.* at 54, 55-56.

C

In sum, we conclude that because no reasonable factfinder could find that "the language of the communication and the circumstances attending its publication by the defendant" were not at least "as consistent with the nonexistence of malice as with its existence, there is no issue for the jury." *Mosrie*, A.2d at 478 (quoting *Disabled Soldiers*, 4 F.2d at 441-42); *see Altimont*, 374 A.2d at 292. It therefore was "the duty of the trial court to direct a verdict for the defendant" on Novecon's claim of defamation. *Mosrie*, 467 A.2d at 479.

IV

For the foregoing reasons, the judgment of the district court is affirmed.[9]

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[9] Although BAEF filed counterclaims against Novecon, it advised the district court that it would withdraw them if its motion for summary judgment were granted in full. Because the district court granted BAEF's motion, it dismissed the counterclaims. 967 F. Supp. at 1391; 977 F. Supp. at 52. The Fund has filed a cross-appeal of that dismissal, but states that it seeks reinstatement only if we reverse the district court's judgment. BAEF Br. at 39; BAEF Reply Br. at 1-2. Because we have affirmed that judgment, we treat the cross-appeal as waived and direct that it be dismissed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7178 **September Term, 1999**
95cv01178

Novecon Ltd., et al.,
Appellants

Filed: October 25, 1999

v.

Bulgarian-American Enterprise Fund, et al.,
Appellees

Consolidated with 97-7182

BEFORE: Wald, Silberman and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed September 30, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Novecon Ltd., et al.,
Appellants

Filed: October 25, 1999

v.

Bulgarian-American Enterprise Fund, et al.,
Appellees

Consolidated with 97-7182

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon considering of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Wald and Tatel did not participate in this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOVECON, Ltd., et al.,	)	
Plaintiffs,	)	
	)	**Civil Action No.**
v.	)	
	)	**95-1178-LFO**
BULGARIAN-AMERICAN	)	
ENTERPRISE FUND, et al.,	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum, it is this 25th day of June 1997 hereby

ORDERED: that the Motion for Summary Judgment [57-1] filed by defendant BAEF should be, and is hereby GRANTED IN PART and DENIED IN PART; and that the claims for breach of contract, promissory estoppel, and quantum meruit are DISMISSED; and that the claim for defamation brought by plaintiff, Richard Rahn is DISMISSED; and it is further

ORDERED: that the Cross-Motion for Summary Judgment [66-1] filed by plaintiffs Novecon, Ltd., et al., should be, and is hereby, GRANTED IN PART and DENIED IN PART; and that the counterclaim for promissory estoppel is DISMISSED; and it is further

ORDERED: that a status conference to discuss further administration of this case is scheduled for July 15, 1997 at 10:00 a.m. in Courtroom 3.

/s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOVECON, Ltd., et al.,	)	
Plaintiffs,	)	
	)	**Civil Action No.**
v.	)	
	)	**95-1178-LFO**
BULGARIAN-AMERICAN	)	
ENTERPRISE FUND, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM

This case involves a failed real estate venture in Sofia, Bulgaria. Plaintiff Novecon, Ltd. ("Novecon") has brought suit against defendants Bulgarian-American Enterprise Fund ("BAEF") and two of its principal officers, Frank Bauer and Nancy Schiller. Novecon alleges primarily that BAEF breached an investment contract by failing to come forth with any promised funding. Currently pending are cross-motions for summary judgment. For the reasons stated below, the Motion for Summary Judgment filed by BAEF will be granted in part, and the Motion for Summary Judgment filed by Novecon will be denied.

I.

A.

Novecon is a private investment firm that specializes in structuring new business ventures in Eastern Europe. Plaintiff Richard W. Rahn is the President and CEO of Novecon. In 1991, Novecon and its Bulgarian partner, Mirpex Co., formed a joint venture called Southern

Park Development ("SPD"), in order to develop a real estate project in Sofia, Bulgaria. The SPD Project anticipated purchasing two parcels of land from a Bulgarian family -- the Batsovs -- and then using that land to build a residential, commercial, and parking complex. In November 1992, Novecon approached BAEF in order to request funding for the SPD Project.

BAEF is a not-for-profit corporation that was established by Congress to promote private sector development and entrepreneurship in Bulgaria. BAEF was authorized to disburse up to $55 million for investment in Bulgaria. Frank Bauer is the President and CEO of BAEF. Nancy Schiller is the Managing Director of BAEF's office in Chicago, Illinois.

B.

In November 1992, when Novecon submitted its initial Funding Proposal to BAEF, it contemplated that BAEF would act as a passive investor and merely provide financial support. The Funding Proposal stated that Batsovs has agreed to sell their two parcels of land to SPD in exchange for a 26 percent stake in the finished complex. The Proposal also set forth an anticipated schedule for development. On March 1, 1993, Schiller wrote to Novecon stating that the BAEF Board of Directors had approved further investigation in the Novecon proposal, but that a BAEF professional would be hired to act as a real estate consultant.

Subsequently, in May and June 1993, BAEF and Novecon exchanged correspondence on four different occasions. Novecon alleges that those four documents comprise the basis for a binding, enforceable contract. The documents are listed as follows:

(1) a Letter dated May 20, 1993 from Schiller to Ronald D. Utt, the managing director of Novecon;
(2) a replay Telefax dated June 1, 1991 from Utt to Schiller;
(3) a Letter dated June 3, 1993 from Schiller to Utt; and
(4) a reply Telefax dated June 3, 1993 from Utt to Schiller.

Each of those communications will be considered in detail.

First, the May 20, 1993 letter from Schiller to Novecon announced that BAEF was "prepared to move forward on the terms outlined in this letter." See Utt Aff. Ex. 10. The letter then stated that BAEF contemplated "a narrower oversight role for SPD than earlier anticipated." Id. at 2. Instead of managing the entire project, SPD would simply be compensated for reaching certain specific goals (e.g., signing of the land sale contract, delivery of unencumbered title, transfer of title, securing zoning amendments and building permits, etc.) BAEF would be the principal party responsible for "chang[ing] the design of the building" and "serv[ing] as property manager for the development." Id. at 3. The letter also stated that the compensation arrangement would be "[c]ontingent on the signing of a definitive agreement." Id. at 2 (emphasis added).

In response, Utt sent a telefax to Schiller dated June 1, 1993. The telefax proposed one amendment to the May 20 offer. Novecon sought to "rearrang[e] the milestones" for which SPD would be compensated. See Utt Aff. Ex. 11. Other than that one change, however, none of the

remaining terms of the offer were altered. At that point, the parties appeared ready to reach an understanding.

Also on June 1, 1993, however, Schiller was notified of an incident at the BAEF office in Sofia, Bulgaria. Apparently, three Bulgarian women had come into the office, claiming to be members of the Batsov family and asserting an ownership interest in the second parcel of land. Known as Phase II. They stated that Alexander Batsov -- the person with whom SPD had been negotiating -- was not authorized to represent them in any attempted sale of that land.

Accordingly, on June 3, 1993, Schiller telefaxed a letter to Novecon raising two issues. See Utt Aff. Ex. 12. First, the June 3 letter proposed yet another fee structure for the compensation of SPD. The letter stated that the revised fee structure would be "include[d] in our request to the Fund's Board for final approval... " Id. (emphasis added). Second, the letter stated that:

> To our great concern, we have been informed by our Sofia office of a rather surprising development. Ms. Lilyana Batsova and two relatives stopped by the BAEF office to discuss Phase II of the project. They claim to have ownership interest in Phase II and have communicated to us that Mr. [Alexander] Batsov has not consulted with them, nor has he been granted the authority to represent them. It was not clear that they yet own the land or that they would work together.
>
> If this is the case, I am sure you realize that the BAEF will not pursue this

> investment... [T]he BAEF will consent to extending our negotiations until June 15, 1993 by which time we will expect certified documentation of the sign off of all heirs to both Phase I and II. If evidence is not received by June 15,1993, the BAEF will rescind its offer to negotiate and terminate its discussions with SPD.

Id. at 2 (emphasis added).

On June 3, 1993, Utt replied in a telefax to Schiller, stating that:

> On behalf of SPD, I accept the terms of the Fund's 20 May 1993 offer and the revised fee schedule. I also understand that your offer is contingent upon a resolution of any and all outstanding uncertainties regarding ownership of both Phase I and II sites, and accept responsibility to resolve the uncertainties to the Fund's satisfaction by the 15 June 1993 deadline.

See Utt. Aff. Ex. 13.

Thereafter, on June 4, 1993, a letter was telefaxed to the BAEF office in Sofia, Bulgaria. The letter was written in English and purportedly signed by Liliana Batsova.[1] The letter states that "I express my written consent, as heir to the Batsov property to sign preliminary contract for phase II with SPD..." See Utt. Aff. Ex. 14. Peculiarly, however, the letter was dated June 6, 1993 --

---

[1] Ms. Batsova is alternatively referred to as Lilyana, Lilliana or Liliana Batsova.

two days after it had already been received by the Sofia office.[2] Moreover, there is an affidavit in the record from Liliana Batsova, who swears that she "do[es] not understand English" and that an employee of Mirpex, Michael Tachev, mis-read her letter in Bulgarian. See Second Batsova Aff. ¶ 3. Batsova avers that "I am amazed that Mr. Tachev has presented a wrong letter to me, and declare that I would have never signed it if I had been able to understand what it said. This letter is a fraud." Id. ¶ 4. In the affidavit of Michael Tachev, he asserts that "[a]t no time did I trick or deceive Liliana Batsova into signing a letter as described by her later affidavit." Tachev Aff. ¶ 2. In any event, Schiller states that the Batsova letter was "at the time considered to be sufficient proof that Phase II was doable on that score." Schiller Aff. ¶ 33.

Sometime thereafter, BAEF consulted with several architectural firms and began to realize that the potential for development on the SPD site was much greater than had been originally anticipated. On June 14, 1993, BAEF notified Novecon that it would proceed with the project, but only if the Batsovs accepted a 12 percent stake in the finished complex, instead of a 26 percent stake. BAEF also informed Novecon that it would extend the June 15 deadline for obtaining firm commitments from the Batsov family until June 28, 1993. Finally, BAEF requested that Novecon cease soliciting funds for the SPD Project from any alternative sources. Novecon agreed to present the new "12 percent" offer to the Batsov family. It also agreed to cease soliciting funds from other prospective investors. See Utt Aff. Ex. 15.

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[2] In his affidavit, Utt claims that he sent the letter to Schiller on June 6 or 7, 1993. He does not contest, however, that someone telefaxed the letter to the Sofia office on June 4, 1993.

On June 28, 1993, Novecon informed BAEF that it could not obtain the consent of all members of the Batsov family to sell their land for a 12 percent ownership stake. Nonetheless, in July 1993, a BAEF consultant, Tom Nelson, traveled to Bulgaria to examine the SPD site. According to Novecon, at that time, BAEF promised to provide detailed architectural plans for the complex. Those plans were necessary to obtain the requisite zoning amendments and building permits. BAEF contends, however, that even if the plans had been provided, it would have taken several additional months for the zoning amendments to proceed through public notice and comment. Since the SPD Project was already "well behind schedule." On November 2, 1993, BAEF informed Novecon that it was withdrawing from any further negotiations. See Utt. Aff. Ex. 17.

C.

Novecon filed its complaint on this case in June 1995. In January 1996, BAEF, Bauer, and Schiller sent letters to approximately 570 individuals and organizations in the United States and Bulgaria. Those letter contained the following statements:

> It is likely that you recently read an op-ed piece that was published in The Wall Street Journal Europe that was critical of the [BAEF]...
>
> The op-ed piece is one of the several articles, all written by Mr. Greg Rushford, a paid professional writer. We find it odd that Mr. Rushford would choose to write about the [BAEF], and then devote nearly one-third of his opinion piece to a lawsuit by a

> Dr, Richard Rahn on behalf of a Washington, D.C. firm called Novecon. Dr. Rahn, through Novecon, seeks to extort $200,000 of U.S. taxpayer money from the BAEF as a fee for a real estate project that the BAEF rejected because it turned out to be a veritable "Brooklyn Bridge" of misrepresentation. Among other problems, Novecon's client did not own the land on which the project was to be developed -- despite representations by Novecon to the contrary. Since there was nothing to sell, we did not buy their "Brooklyn Bridge."

See Rahn Aff. Ex. 19.

Novecon and Rahn contend that the letters was false and defamatory, particularly the statements that they were "seek[ing] to extort $200,00... from the BAEF" and that the SPD project was a "veritable 'Brooklyn Bridge' of misrepresentation." Subsequently, in February 1996, Novecon and Rahn amended their complaint to include a claim of defamation.

II.

A.

In its Motion for Summary Judgment, BAEF contends that it never entered into a binding, enforceable contract with Novecon. BAEF relies on the fact that the Schiller letters dated May 20, 1993 and June 3, 1993, expressly state that any agreement with Novecon would be subject to final approval by the BAEF Board of Directors. See Utt Aff. Ex. 10 at 2 (compensation arrangement would be "[c]ontingent on the signing of a definitive agreement");

Utt Aff. Ex. 12 (revised fee structure would be "include[d] in our request to the Fund's Board for final approval"). Accordingly, BAEF claims that Schiller lacked any authority to enter into a binding contract with Novecon.

Novecon contends, however, that Schiller had "apparent" authority to bind BAEF. There is no question that she was an agent of BAEF, and "[a]pparent authority exists... to the extent that it is reasonable for a third person dealing with the agent to believe that the agent is authorized." See Williams v. WMATA, 721 F.2d 1412, 1416 n.7 (D.C. Cir. 1983). In this case, however, it was not reasonable for Novecon to believe that Schiller was authorized to enter into contractual obligations on behalf of BAEF. On at least two occasions, Schiller expressly cautioned that her statements were subject to approval by the BAEF Board of Directors. Moreover, Novecon has not alleged any situation where Schiller ever implied otherwise. Accordingly, the statements in her affidavit are uncontested where she avers that "[a]t no time did I ever represent to Novecon, SPD, or Mirpex or anyone else for that matter, that I had the authority to legally bind the Fund. I did not have the authority in 1993 and I do not have that authority today." Schiller Aff. ¶ 2.

Novecon also contends that, even if there was no "apparent" authority, Schiller had "actual" authority to bind BAEF. Novecon makes a puzzling reference to the "statement of authority given [to Schiller] by her boss." See Pl.'s Br. in Opp'n to Defs.' Mot. For Summ. J., at 12. There is no evidence, however, of that so-called "statement of authority" in the record. Without any admissible evidence to support its claim of actual authority Novecon cannot contradict Schiller's statement that "I do not have that authority [to bind BAEF] in 1993 and I do not have that authority today." Schiller Aff. ¶ 2.

Even assuming, arguendo, however, that Schiller did have either apparent or actual authority to bind BAEF, it appears as a matter of law that the correspondence from May to June 1993 did not create a binding, enforceable contract. BAEF cities the case of Jack Baker, Inc. v. Office Space Development Corp., 664 A.2d 1236, 1238 (D.C. 1995), where the D.C. Court of Appeals provided an insightful discussion on the issues of contract formation. The Court began by acknowledging that two parties my enter into a binding contract, even though they anticipate drafting a subsequent written memorialization. The only requirements for contract formation are (1) an agreement as to all material terms, and (2) an intention by both parties to be bound. Id.

Where there is no written draft of an agreement, however, it is the burden of the party asserting the contract to prove that a "meeting of the minds" occurred. "[T]his burden is particularly onerous." Id. "'If the document or contract that that the parties agree to make is to contain any material term that is not yet agreed on, no contract has yet been made; and the so-called 'contract to make a contract' is not a contract at all.'" Id. at 1239 (quoting Arthur L. Corbin. Corbin Contracts § 2.8 (1993)). The Court in Jack Baker articulated five factors that it believed would be "useful to determine whether an oral agreement in contemplation of written contract is enforceable." Id. Those five factors are appropriately considered here:

> (1) whether the contract is one usually put in writing, (2) whether there are few or many details, (3) whether the amount involved is large or small, (4) whether it requires a formal writing for a full expression of the covenants and promises, and (5) whether the negotiations indicate that a written draft is

> contemplated as the final conclusion of negotiations.

Id. The Second Circuit has articulated a similar test and held that summary judgment is proper where the evidence on these factors is "overwhelming in favor of one person." See R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984).

In this case, an analysis of the relevant factors indicates strongly that there was no binding contract. The negotiations here involved a complex real estate transaction in a foreign country. It is undoubted that such transactions are "usually put in writing." See Jack Baker, 664 A.2d at 1240; see also R.G. Group, 751 F.2d at 75 ("[A]bove a certain level of investment and complexity, requiring written contracts may be the norm in the business world..."). Second, this transaction involved numerous details that had yet to be finalized, e.g., the precise boundaries of the land parcels, a firm commitment from all the members of the Batsov family, and the precise date that title would transfer to BAEF.

Third, the amount of money involved ($200,000) was not insubstantial. Even putting dollar amounts aside, however, the importance of this transaction was reflected in the fact that BAEF declared that "Southern Park will be the first real estate development that the Fund undertakes in Bulgaria. It is essential that it be successful." See Utt Aff. Ex. 10 (the May 20 letter). Fourth, the complexity of this agreement, as noted above, indicates that a formal writing [would be required] for full expression of the covenants and promises." See Jack Baker, 664 A.2d at 1240.

Lastly and most importantly, the "negotiations indicate[d] that a written draft [wa]s contemplated as the

final conclusion of negotiations." Id.; see also R.G. Group, 751 F.2d at 75. ("[W]hen a party gives forthsight, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent."). Id. In this case, the two letters from BAEF upon which Novecon relies in asserting the existence of a contract, both clearly indicate that a "definitive" or "final" written agreement was contemplated. "[I]t is not surprising that considerable weight is put on a party's explicit statement that it reserves the right to be bound only when a written agreement is signed. Courts are reluctant to discount such a clear signal, and it does not matter whether the signal is given during the course of bargaining, or at the time of the alleged agreement." Id.; see also Doll v. Grand Union Co., 925 F.2d 1363, 1370 (11th Cir. 1991) ("[W]e are unwilling to allow a jury to infer an agreement... when one of the parties specifically declared its intention not to be bound until a lease was drafted and signed by both parties.")

In opposition, Novecon relies on the case of NRM Corp. v. Hercules, Inc., 758 F.2d 676 (D.C. Cir. 1985), and argues that subsequent actions taken by parties--after the alleged contract was formed on June 3, 1993--indicate that the parties believed there was a binding contract in existence. Although Novecon contends that NRM is "factually akin" to this case, see Pl.'s Opp'n to Mot. for Summ. J., it is difficult to see where any kinship lies. In NRM, there was an undisputed contract between the two parties, in which NRM agreed to provide certain specialized machine tools to Hercules. Id. at 677 & nn. 2, 3; see also id. at 682 n. 17. The contract also contained a clause that allowed Hercules to change its specifications for the machine tools unilaterally. In the event of such a change, however, NRM was entitled to submit an "equitable adjustment" for the cost of those changes.

The central question in NRM was whether the term "equitable adjustment" included other, indirect costs--such as the costs created by delays in incorporating the unchanged parts. The Court concluded that the language in the contract was ambiguous and therefore, summary judgment was inappropriate. The only reference in NRM that could be considered remotely applicable here is a footnote that discusses the formation of the contract. See id. at 682 n. 17. The Court stated that, although the contract was not finalized in any "particular document or statement" the "aggregate of communications... indisputably led to a binding obligation to perform..." Id. By contrast, in this case, it is far from "indisputabl[e]" that the "aggregate of communications" resulted in a binding contract. The analysis in NRM does nothing to shed light on this dispositive issue.

Although the cases cited by Novecon are hardly on point, the argument concerning the subsequent actions taken by both parties is relevant. The Second Circuit in R.G. Group stated that where one party executes a "partial performance" of its obligations under the alleged contract and the other party accepts the performance, this factor should be taken into consideration to determine whether a binding contract existed. See R.G. Group, 751 F.2d at 75-76. "[P]artial performance is an unmistakable signal that one party believes their is a contract; and the party who accepts performance signals, by that act, that it also understands a contract to be in effect." Id.; see also Viacom International, Inc. v. Tandem Productions, Inc., 368 F. Supp.1264, 1270 (S.D.N.Y. 1974) (partial performance is "strong circumstantial proof that the minds of the parties had met on the essential elements and that they were not waiting for a formal written instrument"), aff'd, 526 F. 2d 593 (2d Cir. 1975).

In this case, however, the facts indicate that none of the subsequent actions be taken by Novecon or BAEF amounted to a partial performance or acceptance thereof. After June 3, 1993, Novecon continued to negotiate with the Batsov family, but those negotiations were never consummated. Nor was Novecon successful in obtaining any zoning amendments or building permits for the SPD Project. Thus, Novecon failed to reach any of the milestones set forth in the alleged contract. Furthermore, there was no acceptance on the part of BAEF with regard to any alleged partial performance rendered by Novecon. At most, Novecon merely attempted to effect partial performance. That fact alone, however, cannot stand against the overwhelming evidence that indicates the parties did not intend to be bound contractually until the completion of a formal, written agreement. Accordingly, since no reasonable trier-of-fact could find that a binding contract existed here, summary judgment is appropriate in favor of BAEF.

B.

Novecon also contends, in the alternative, that it should be able to recover damages under the quasi-contractual theories of promissory estoppel and/or quantum meruit. Neither of those claims, however, can prevail. Under a theory of promissory estoppel, Novecon must be able to show that it relied reasonably on the promises given by BAEF. See Bender v. The Design Store Corp., 404 A.2d 194, 196 (D.C. 1979). Yet the efforts here undertaken by Novecon were made in reliance on a "promise" that was expressly conditioned on ratification by the BAEF Board of Directors. see Doll, 925 F.2d at 1372-73.

In Doll, the Eleventh Circuit held that no reasonable trier-of-fact could find the element of reasonable reliance where the defendant had given "repeated caveats that it did not intend to be bound until a final lease agreement was signed." Id. at 1373. Similarly, in this case, Schiller repeatedly cautioned that BAEF did not intend to be bound until the execution of a final written agreement. Accordingly, there is no basis on which Novecon can contend that it acted reasonably by relying on the statement made by Schiller.[3]

The only situation where Novecon could plausibly argue that it relied reasonably was in its decision to forgo seeking alternative sources of funding for the SPD Project. In that instance, however, BAEF merely requested that Novecon cease its solicitations. There is no indication that any promise was made in connection with that request. Where a party does not make any promise, either express or implied, there can be no basis for a finding of promissory estoppel. see Bender, 404 A.2d at 196-97.

Next, with regard to the claim for quantum meruit, Novecon cannot show that it rendered any "valuable services" to BAEF. See In re Rich, 337 A.2d 764, 766 (D.C. 1975) ("The essential elements for recovery [include] valuable services rendered.. for the person sought to be charged..."). Although Novecon contends that it performed certain, unspecified "work" for BAEF, presumably

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[3] Novecon does not raise the claim that it relied reasonably on an implicit "promise [by BAEF] to bargain in good faith." See Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 73-74 (2d Cir. 1989) (finding promissory estoppel in the absence of binding contract where plaintiff incurred out-of-pocket expenses during negotiations and defendant called off negotiations in bad faith); see also Corbin, supra, § 2.9. Accordingly, that argument will be deemed waived.

referring to its preliminary negotiations with the Batsov family, it is clear from the record that such work--although causing a detriment to Novecon--resulted in nothing of value to BAEF. "[A] party's expenditures in preparation for performance that do not confer a benefit on the other party do not give rise to a restitution interest." See Restatement (2d) of Contracts § 370 cmt. (1981); see also id. illus. 2; E. Allan Farnsworth, Farnsworth on Contracts, § 3.26, at 314 ("[T]he claimant must be able to show that its services resulted in an actual benefit to the defendant."). Accordingly, there is no basis for finding of unjust enrichment.

Moreover, in Sabin v. Regardie, Regardie & Bartow, 770 F. Supp. 5 (D.D.C. 1991), this District stated that:

> "Courts generally have refused to find unjust enrichment from services rendered without pay where the services were given during the negotiation phase of a commercial undertaking.
>
> Where preliminary services are conferred for business reasons, without the anticipation that reimbursement will directly result, but rather with the expectation of obtaining a hoped-for-contract and incidental to negotiations related thereto, quasi-contract relief is unwarranted."

See id. at 10-11 (quoting North American Financial Group, Ltd. v. S.M.R. Enterprises, Inc., 583 F. Supp. 691, 700 (N.D. Ill. 1984)). That statement is directly applicable here. Thus, Novecon cannot obtain relief based on a claim of quantum meruit.

In sum, the undisputed facts in this case reveal a situation where both parties from the outset sought to develop a mutually profitable venture, but for one reason or another, were unable to reach a firm agreement. Both BAEF and Novecon expended significant resources, time, and effort during their negotiations, and it is only natural that there is now some measure of disappointment. Yet the record is clear that BAEF extended only an "offer to negotiate," see Utt Aff. Ex. 12 at 2 (the June 3 letter from Schiller to Utt) (emphasis added), which Novecon "accepted," see Utt Aff. Ex. 13 (the June 3 letter from Utt to Schiller). That offer and acceptance constitutes nothing more than an agreement to continue negotiations, i.e., an "agreement to agree," and Novecon cannot enforce any binding, legal obligations against BAEF.

C.

Lastly, Novecon and plaintiff Richard Rahn, the President and CEO of Novecon, have brought a claim for defamation against BAEF, Schiller and defendant Frank Bauer, the President and CEO of BAEF. That claim is premised on some 570 letters that were sent to various individuals and organization regarding the SPD Project. BAEF has now moved for summary judgment, contending that, as a matter of law, the claim for defamation cannot stand. BAEF argues that Rahn is a "limited-purpose" public figure for the sake of First Amendment analysis, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974), and that the undisputed facts here do not support a finding of actual malice, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

In Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), the D.C. Circuit enumerated

three factors to be considered in determining whether a plaintiff is a limited-purpose public figure: (1) there must be a public controversy; (2) the plaintiff must have achieved a special prominence in the debate; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy. Id. at 1296-98. Although Rahn purports to distinguish Waldbaum as a case involving a "media" defendant, the Supreme Court has indicated that the First Amendment applies with equal force regardless of whether the defendant is a member of the "established media" or not. See Dun & Bradstreet, Inc. v. Green Moss Builders, Inc., 472 U.S. 749, 773-74 & n.4 (White, J., concurring); id. at 781-84 (Brennan, J., dissenting); see also Vereen v. Clayborne, 623 A.2d 1190, 1194-95 (D.C. 1993).

In this case, BAEF contends that there was a public controversy regarding the performance of BAEF. Apparently, in November 1995, after this lawsuit was commenced, Rahn sent letters to various members of Congress, stating that:

> There is considerable evidence that the [BAEF], an agency of the U.S. government, has abused its fiduciary responsibility with taxpayer money that has been entrusted to them; does not have competent management; has conducted its activities in such a way as to give the appearance, if not the fact, of a conflict of interest among certain senior managers and members of the Board; has acted in a manner damaging to legitimate U.S. businesses; and has damaged U.S.-Bulgarian relations rather than improve them. Therefore, I respectfully request your staff to investigate and perhaps hold

> hearings on the above mentioned issues regarding the BAEF.

See Bauer Aff. Attach. BB; see also Bauer Reply Aff. Attach K. the letters sent by Rahn also described the poor performance of BAEF investments, detailed the failure of the Novecon/SPD Project, and intimated that certain officers and directors of BAEF had engaged in favoritism while making investment decisions. Subsequently, in January 1996, the Wall Street Journal Europe published an op-ed article that was critical of the investments made by BAEF, as well as, its management style.

Based on the undisputed facts, it is clear that there was a legitimate public controversy regarding the performance of BAEF. Moreover, Rahn "achieved a 'special prominence' in the debate." See Waldbaum, 627 F.2d at 1297. By sending letters to members of Congress, Rahn "purposely tr[ied] to influence the outcome." Id. In addition, that influence was furthered by the fact that Rahn is apparently well-recognized among international economic circles due to his former positions as Vice-President and Chief Economist of the United States Chamber of Commerce. See Bauer Aff. Attach FF.

Third, the allegedly defamatory letters sent by BAEF were in direct response to the comments made by Rahn and others. Accordingly, there is a nexus between the alleged defamation and Rahn's participation in public controversy. Therefore, the three prerequisites have been satisfied in order to find, as a matter of law, that Rahn was a limited-purpose public figure.

In that situation, the constitutional protections of New York Times v. Sullivan apply. Rahn fails to point to any evidence that would support a finding of actual malice.

In fact, the only cases cited by Rahn involved strictly private plaintiffs, who are not required to overcome any First Amendment hurdles in order to prove defamation. See White v. Fraternal Order of Police, 909 F.2d 512, 514-516 (D.C. Cir. 1990); Swengler v. ITT Corp., 993 F.2d 1063, 1071 n.5 (4th Cir. 1993). Accordingly, the claim for defamation raised by Rahn will be dismissed.

The argument with respect to Novecon (as opposed to Rahn), however, is somewhat more complicated. BAEF does not provide substantial analysis as to whether Novecon should be considered a limited-purpose public figure. Rather, BAEF simply assumes ipse dixit that Novecon and Rahn are interchangeable. That assumption is without basis. The only supporting evidence is the fact that the letters written by Rahn to various Congressmen about BAEF was drafted on Novecon letterhead. Yet there is no indication that, as a result, Novecon achieved a "special prominence" in the debate, nor that it had a "position in the controversy" that could reasonably "have impact on its resolution." Waldbaum, 627 F.2d at 1297. Accordingly, the Motion for Summary Judgment will be denied in part, and the claim for defamation raised by Novecon will be allowed to proceed.

III.

Novecon has also moved for summary judgment, contending that the two counterclaims raised by BAEF must fail as a matter of law. Those counterclaims rest on allegations of promissory estoppel and negligent misrepresentation. BAEF has stated, however, that it will withdraw its counterclaim for promissory estoppel, if the Novecon claims based on similar grounds are dismissed. Since that contingency will come to pass, see Part II.B.,

supra, no further discussion of the first counterclaim is necessary.

With regard to the second counterclaim, the Motion for Summary Judgment filed by Novecon argues that BAEF "knew everything" prior to making its "offer" in May 1993. That argument merits little discussion. (In fact, Novecon itself devotes less than a page to asserting its own contentions.) The record indicates that there is a substantial issue of fact concerning whether Novecon misrepresented (1) the Batsov ownership of the property, and (2) the ease with which it could obtain zoning amendments for the SPD property. See Bauer Aff. ¶ 43-44, 46-47, 49. There is also significant dispute over whether BAEF actually relied on those representations to its detriment. Accordingly, the counterclaim for negligent misrepresentation will be allowed to proceed.

Dated: July 15, 1997

/s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOVECON, Ltd., et al.,	)	
Plaintiffs,	)	
	)	**Civil Action No.**
v.	)	
	)	**95-1178-LFO**
BULGARIAN-AMERICAN	)	
ENTERPRISE FUND, et al.,	)	
	)	
Defendants.	)	

Filed: September 16, 1997

ORDER

For reasons stated in the accompanying Memorandum, it is this 16th day of September 1997, hereby

ORDERED: that, upon reconsideration, defendants' motion for summary judgment on plaintiff Novecon's defamation claim should be, and is hereby, GRANTED; and it is further

ORDERED: that the defendants' counterclaim for negligent misrepresentation should be, and is hereby, DISMISSED; and it is further

ORDERED: that the complaint should be, and is hereby, DISMISSED.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

FOR THE DISTRICT OF COLUMBIA

NOVECON, Ltd., et al.,	)	
Plaintiffs,	)	
	)	**Civil Action No.**
v.	)	
	)	**95-1178-LFO**
BULGARIAN-AMERICAN	)	
ENTERPRISE FUND, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM

A Memorandum and an Order of June 26, 1997 granted defendants' motion for summary judgment with respect to the contract issues and with respect to the defamation claim of plaintiff Richard W. Rahn, and denied plaintiffs' motion for summary judgment on defendants' counterclaim for negligent misrepresentations. See Novecon, Ltd. v. Bulgarian-American Enterprise Fund, 967 F. Supp. 1382 (D.D.C. 1997). The ruling denied defendants' motion for summary judgment on the defamation claim of the corporate plaintiffs, Novecon, Ltd. and Novecon Management Co. (referred to hereinafter as if they were a single corporation), because there was no showing that the corporate entity, as distinguished from its chairman and CEO, Rahn, was a limited-purpose public figure, See id. at 1391.

Defendants have moved for reconsideration of the denial of summary judgment on the Novecon defamation claim. The original pleadings, argument, and consideration of that claim focused sharply on the classification of Rahn as a limited-purpose public figure, with only passing reference to defendants' other grounds for summary

judgment. An oral argument on that motion and post-argument filings by the parties persuade me that defendants' motion with respect to the Novecon defamation claim is well-taken. Given the prominent role that summary judgment rulings serve in the protection of First Amendment interests, see Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), the defendants' motion will be granted and the remaining claims in this case will be dismissed.

I.

The June 26 memorandum relates the underlying contract dispute at the center of this litigation, which was resolved by the holding that no contract between the parties was, in fact, ever formed. The essential undisputed facts of the subsequent defamation claim are rather straightforward. Within a few months after Novecon Filed its breach of contract action, BAEF received word that Rahn had visited the American ambassador to Bulgaria to discuss the lawsuit, that he had communicated with members of Congress about it, and that he intended to furnish Forbes magazine and several newspapers a letter or news release about the lawsuit and critical of BAEF. Shortly thereafter Rahn wrote to members of Congress, charging that defendant BAEF,

> an agency of the U.S. government, has bused its fiduciary responsibility with taxpayer money that has been entrusted to them; does not have competent management; has conducted its activities in such a way as to give the appearance, if not the fact, of a conflict of interest among certain senior managers and members of the

> Board; has acted in a manner damaging to legitimate U.S. businesses; and has damaged U.S.-Bulgarian relations rather than improve them....
>
> ....
>
> The BAEF has not only damaged American companies doing business in Bulgaria, but has unnecessarily alienated many Bulgarian business people because of its incompetence and arrogance...
>
> ... The evidence of mismanagement or worse is now abundant, and clearly an investigation is warranted.

Bauer Aff. Attach. BB at 1-2.

Robert Odle, an attorney with apparent access to and influence with BAEF testified in an uncontroverted affidavit that he received a number of phone calls and other communications from Rahn, which Odle perceived as intended to reach BAEF. In these communications to Odle, Rahn disparaged BAEF and pointedly suggested that he would bring his criticisms to the attention of Congress, the State Department, and the press if BAEF did not settle the lawsuit. Odle also received from Rahn a two-page fax describing the litigation in what he judged to be a draft form of an op-ed article. Shortly thereafter, Rahn sent Odle the January 1996 issue of The Rushford Report, which featured a lead article highly critical of BAEF, along with a request to "[p]lease, note the attached." Odle Aff. Attach. D.

At about the same time, the Wall Street Journal Europe published an op-ed article by Greg Rushford, the editor and publisher of The Rushford Report, entitled, "AID's Boondoogle in Bulgaria." The article charged that BAEF had wasted taxpayer money on staff salaries, expensive office space, computers, automobiles, accountants, and attorneys. It specifically reported about this lawsuit that "four high-priced lawyers" had appeared to argue BAEF's motion to dismiss--a fact that Rahn had previously told Odle "would make interesting reading in the press," according to notes taken by Odle's secretary. Odle Aff. ¶ 12. The article included a favorite profile of Rahn and criticisms of BAEF's then-counsel in this case with some emphasis on the fact that counsel "declined repeated requests for their side of the story." Bauer Aff. Attach. GG. Several other newspapers in Bulgaria, including the country's largest, reprinted the allegations of the Journal article.

BAEF determined to defend its business reputation against Rahn's charges and the spate of negative publicity. (on a prior occasion, the Bulgarian National Bank had suspended BAEF's operations in Bulgaria for over two months on the basis of an inaccurate news report.) defendants circulated a package of information clarifying its position in this lawsuit to those whom they believe had received damaging information about BAEF. It is the cover letter to that communication which plaintiffs claim to be actionable. It stated in full:

It is likely that you recently read an op-ed piece that was published in The Wall Street Journal Europe that was critical of the Bulgarian-American Enterprise Fund. Along with this piece we are enclosing the BAEF's response which was printed on January 16, 1996 in The Wall Street Journal Europe.

The op-ed piece is one of several articles, all written by Mr. Greg Rushford, a paid professional writer. We find it odd that Mr. Rushford would choose to write about the Bulgarian-American Enterprise Fund, and then devote nearly one-third of his opinion piece to a lawsuit by a Dr. Richard Rahn on behalf of a Washington, D.C. firm called Novecon. Dr. Rahn, through Novecon, seeks to extort $200,000 of U.S. taxpayer money from the BAEF as a fees for a real estate project that the BAEF rejected because it turned out to be a veritable "Brooklyn Bridge" of misrepresentation. Among other problems, Novecon's client did not own the land on which the project was to be developed--despite representations by Novecon to the contrary. Since there was nothing to sell, we did not buy their "Brooklyn Bridge".

> We know that you are interested in the activities of the BAEF and that you recognize the unique role of the Fund in helping to promote the private sector in Bulgaria. A lot of progress has been made--we are now in the process of funding your 500th investment--and we expect such progress to continue. As always, we appreciate your support and would be glad to discuss with you any issues relating to the BAEF and its operations.

Rahn Aff. Ex. 19.

As described in the affidavit of defendant Frank Bauer, BAEF's president and CEO. BAEF distributed this cover letter and package of information to over five hundred addresses--government officials in the United States and Bulgaria, individuals within foundations and

enterprise funds, and other in Bulgaria with whom BAEF did or hoped to do business. Bauer Aff. ¶ 91-92.[1]

II.

The June 26, 1997 Memorandum and Order classified Rahn as a limited-purpose public figure, but found the evidence insufficient to place Novecon, the corporation that he heads, in that category. See Novecon, supra, 967 F. Supp. at 1391-92. In their initial pleadings, none of the parties emphasized the independent role of Novecon in the BAEF public controversy or the application of the common law of defamation to the facts here.

In support of their motion for reconsideration, defendants have demonstrated that Novecon is a stand-alone, going concern with a corporate life of its own, including stockholders, directors, executives, and employees other than Rahn, and transacting in its own name and right. Originally, Novecon was the sole plaintiff in this lawsuit, which gave rise to the subsequent controversy underlying plaintiffs' claims of defamation; Rahn was joined as a plaintiff and counter-defendant at a later stage. Further analysis yields the conclusion that Novecon qua corporation was an accountable participant in, and puntative beneficiary of, the dissemination of derogatory information about defendants. For example, settlement proceeds would have inured to the benefit of Novecon if,

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[1] In an August 11, 1997 filing, plaintiffs objected to consideration of this affidavit because they have not learned the precise identity of all the recipients of BAEF's cover letter. Presumably they wish to conduct discovery with each such recipient. However, they have not filed the affidavit contemplated by Federal Rule of Civil Procedure 56(f), a requisite to mandated discovery in aid of opposition to a motion for summary judgment. Plaintiffs have thereby forfeited the privilege of discovery prior to summary judgment.

by fomenting a congressional investigation or by the treat of one, plaintiffs had persuaded defendants to settle the contract claim. Quite apart from Rahn, Novecon would profit from successful prosecution of this lawsuit and suffer detriment from the loss of it.

It remains clear that Rahn's impressive resume is a factor in his public figure status that distinguishes him from the separate entity Novecon. But his status as a limited-purpose public figure is primarily a function of his role in the larger public controversy between BAEF and Novecon. In short, reconsideration of the undisputed facts in the record leads to the conclusion that Novecon is much more than Rahn's letterhead in this controversy. Because Novecon fired the first shot and would have been the principal beneficiary if plaintiffs had prevailed, it also qualifies as a limited-purpose public figure under the standard enunciated in Waldbaum v. Fairchild Publication, Inc., 627 F.2d 1287 (D.C. Cir. 1980), as applied to Rahn on the June 26 Memorandum. Absent a showing of actual malice, the defendants enjoy the right to say publicly what they said about their side of the controversy with Novecon, free from any threat of liability for defamation.

III.

Defendants also persuasively contend in their motion to reconsider that they enjoy a common law privilege against defamation in order to defend the reputation of BAEF. Quite apart from the classification of plaintiffs as limited-purpose public figures, defendants would have "'a complete defense to libel,... [absent] the showing of malice'" under this asserted defense. Columbia First Bank v. Ferguson, 665 A.2d 650, 656 (D.C. 1995) (quoting Mosrie v. Trussell, 467 A.2d 475, 477 (D.C. 1983)). The parties did not develop this issue in their oral

arguments and original pleadings, and the June 26 Memorandum did not reach it. Since "summary procedures are... essential" to guarantee robust discussion of public controversies, Washington Post Co., supra, 365 F.2d at 968, it is appropriate to address it now.

The common law privilege invoked by the defendants is rooted in Byron Park's 1834 statement that a publication is not actionable when it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. This qualified privilege to protect or advance a defendant's own legitimate interests has been well described as "[r]oughly similar to the privileges of self-defense of the defense of property." Prosser and Keeton on Torts 825 (W. Page Keeton et al. eds.. 5th ed. 1984). "Thus," it is said, a defendant "may publish, in an appropriate manner, anything which reasonably appears to be necessary to defend his own reputation against the defamation of another including, of course, the allegation that his accuser is an unmitigated liar and the truth is not in him." Id. (footnote omitted).

The District of Columbia Court of Appeals has recently particularized these basic principles:

> [T]o be actionable, [a statement]... must have been both false and defamatory. Even if a statement is defamatory, however, it may be protected by a qualified privilege if it is '(1) made in good faith, (2) on a subject in which the party communicating has an interest,... (3) to a person who has such a corresponding interest.'

Columbia First Bank, supra, 665 A.2d at 655 (citation omitted) (quoting Moss v. Stockard, 580 A.2d 1011, 1024 (D.C. 1990)); see also Collins v. Brown, 268 F. Supp. 198, 200 (D.D.C. 1967) (privileging statement when there is "a reasonable ground for making [it], either in the legitimate interest of the person uttering it, or of the person to whom it is communicated"). In this jurisdiction, as elsewhere, "[w]hether a statement is protected by a privilege is a question of law for the court." Columbia First Bank, supra, 665 A.2d at 655; see also Mosrie, supra, 467 A.2d at 477.

Here, BAEF's interest in defending its business reputation before U.S. government agencies, Bulgarian officials, and actual and potential business relations within the Bulgarian private sector is manifest. The foregoing facts demonstrate that plaintiffs themselves stimulated the interests of the governmental, media, and commercial parties who received defendants' allegedly defamatory communication. Plaintiffs initiated the lawsuit. it was they who went public with it, their account embellished by derogatory remarks about defendants generally.

The common law qualified privilege asserted here does not demand that defendants demonstrate failsafe precision in identifying third parties with a sufficient interest in BAEF's public controversy. As the Restatement persuasively states the proposition:

> If on an occasion giving rise to a conditional privilege the publisher mistakenly communicates the defamatory matter to some person to whom he is not otherwise privileged to publish it, he is protected if... he reasonably believes that the person to whom he communicated it is a person whose

> knowledge of the matter would be useful in the protection of the interest in question.

Restatement (Second) of Torts § 604 cmt. e (1977).

Defendants made a judgment call about the reverberations of Novecon's criticisms by media and word of mouth throughout the United States and in Bulgaria. They attempted to reach persons whose opinions of BAEF were, or reasonably could have been, affected by plaintiffs' comments and the ensuing wave of negative publicity. See, e.g., Bauer Aff. ¶¶ 91-92. Appraised by a rule of reason, defendants' choice of recipients for its communication, as disclosed by the record, is sufficient to carry their burden under the common law qualified privilege.

IV.

The question remains, as in most defamation litigation, whether plaintiffs have carried their burden of proving actual malice. Summarizing the District of Columbia law on the subject:

> "[Malice is] the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will." But even a showing of ill will toward the plaintiff... "will not forfeit the privilege so long as the *primary* purpose is to further the interest which is entitled to protection." Thus, in deciding whether a particular statement is protected by a qualified privilege, we must

> "look[] to the primary motive by which the defendant is apparently inspired...."

Columbia First Bank, supra, 665 A.2d at 656 (citations and footnote omitted).

The June 26 Memorandum held that plaintiff "Rahn fail[ed] to point to any evidence that would support a finding of actual malice." Novecon, supra, 967 F. Supp. at 1390. Likewise, based on unrefuted facts in the Bauer, Rollins and Schiller affidavits, no reasonable trier of fact could find that defendants made and distributed their statement "'without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of [Novecon] as to constitute ill will." Columbia First Bank, supra, 665 A.2d at 656.

Plaintiffs' defamation claim focused principally on two phrases in defendants' cover letter: that "Dr. Rahn, through Novecon, seeks to extort $200,000 of U.S. taxpayer money from the BAEF, " and that the original contract proposal amounted to "a veritable 'Brooklyn Bridge' of misrepresentation."[2] For example, plaintiffs

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[2] Plaintiffs raised objections to other portions of the letter. They alleged that the statement challenging ownership of the land offered for sale by Novecon's client and other insinuations of fraudulence on Novecon's part were false and defamatory. These allegation, of course, go to the substance of Novecon's contract claim. In light of the summary judgment order entered for defendants on June 26, it cannot be said that defendants acted with actual malice in communicating these remarks--remarks that conveyed the essence of its successful litigating posture in the contract phase of this case.

Plaintiffs also claimed that the letter falsely suggested that Novecon paid Greg Rushford to write the Wall Street Journal Europe article critical of BAEF. While a "defamatory imputation may be

charged, "Defendants knew that plaintiffs had not been convicted of extortion and that what they were saying was false." Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. at 23.

Yet nothing proffered by plaintiffs or apparent on the face of the challenged statements demonstrates "with convincing clarity" that defendants made false assertions of fact knowingly or recklessly. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). No reasonable fact finder could conclude defendants believed, contrary to their litigating position here, that Novecon was entitled to the $200,000 fee it claimed or that the parties had formed a contract. Nor could a reasonable trier of fact fail to credit defendants' reasonable belief that Novecon's communications would, unless countered, seriously damage BAEF's status with the U.S. government which created it, Bulgarian officials who could control it, and other Bulgarians with whom it said or hoped to do business.

The Supreme Court established the constitutional threshold of "actual malice" for defamation actions brought by public figures (even limited-purpose ones, see Gertz v.

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made by innuendo, by figure of speech,...[or] by allusion' as readily as by explicit language, Restatement, supra, § 563 cmt. c, there is no basis in the record for reading BAEF's cover letter as creatively as plaintiff did. At most, the letter implies that Rushford lacked the objectivity expected of a professional journalist and was unduly influenced by Novecon's perspective of its contract dispute with BAEF. While this implication might arguably damage Rushford's reputation, it does not defame any of the plaintiffs who reasonably would be expected to present their point of view to the media in a most favorable light. Insofar as the letter suggests any direct connection between Rahn's out-of-court statements about BAEF and its pending litigation to warrant speculation about Novecon's "odd[ly]" favorable press coverage.

Robert Welch, Inc., 418 U.S. 323, 351 (1974)) based on "the principal that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks...." New York Times Co. v. Sullivan, 376 U.S. 354, 270 (1964). While characterization of challenged statements as opinion does not confer an automatic and complete defense to defamation, see Milovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990). "allowance must be made for ""imaginative expression" or the "rhetorical hyperbole" which had added much to the discourse of our Nation."" Sigal Construction Corp v. Stanbury, 586 A.2d 1204, 1210 (D.C. 1991) (quoting Milkovich, supra, 497 U.S. at 20).

This truth is certainly evident here. Defendants' reference to the "Brooklyn Bridge" was a figure of speech that reflected the defendants' assessment of Novecon's contract offer, obviously subject to many debatable interpretations. Similarly, the verb "extort" is capable of a variety of applications. Although not Webster's principal definition of the term, his Third New International Dictionary includes the following meanings:

> to obtain from an unwilling or reluctant person by opportunity, argument, or ingenuity <[extort] a confession><she did at last [extort] from her father an acknowledgment that the horses were engaged-Jane Austen><[extorted] his resignation in exchange-Seymour Freidin> **b:** to elicit from someone unwilling by the obvious or apparent existence of an intrinsic compelling force <his intelligence [extorted] the admiration even of his worst enemies>

Webster's Third New International Dictionary 806 (1981).

Defendants' exercise of poetic license is protected by the First Amendment, as the Supreme Court's ruling in Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) makes clear. In Bresler, a prominent real estate developer-a public figure with respect the that litigation-petitioned a city council for a zoning variance while simultaneously negotiating with the city the sale of desirable real estate. State courts awarded Bresler a defamation judgment against a newspaper that had truthfully reiterated accusations of "blackmail" made in public hearings. Applying the "actual malice" standard, the Supreme Court reversed the judgment:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging that Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

id. at 14 (footnote omitted).

Indeed, a recent Washington Post editorial repeated an accusation that a United States Senator was engaged in

"ideological extortion." See The Senate Capitulates, Wash. Post, Sept. 16, 1997, at A16. It is inconceivable that a reasonable reader could interpret this statement as charging the Senator with the crime of extortion. See also Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin, 418 U.S. 264, 283-87 (1974) (holding that word "traitor" in Jack London's definition of union scab, reprinted in union literature, did not give raise to defamation action under federal labor law); Cafeteria Employees Union Local 302 v. Angelos, 320 U.S. 293, 295 (1943) ("[T]o use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies... is not to falsify facts.")

Our Court of Appeals has read Bresler to emphasize "the importance of context, because it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." Moldea v. New York Times Co., 22 F.3d 310, 314 (D.C. Cir. 1994). In this case, defendants prepared the allegedly defamatory letter directly in response to criticisms in the international and Bulgarian news media, which defendants could reasonably trace to its dispute with Novecon. The letter introduced a package of material, including The Wall Street Journal Europe article critical of BAEF, "so the [recipients] could judge themselves." Bauer Aff. ¶ 90.

As a matter of law, therefore, the BAEF letter referred to limited-purpose public figures in a public controversy. It also enjoyed a common law qualified privilege to use "rhetorical hyperbole, [and] lusty and imaginative expression" far short of actual malice. Austin, supra, 418 U.S. 286. Accordingly, this reconsideration requires entry of summary judgment for defendants on Novecon's defamation claim.

****

The entry of summary judgement for defendants on plaintiffs' remaining claims leaves only defendants' counterclaim of negligent representation. In July 23, 1997 letter,[3] defendants advised that they would withdraw their counterclaim if their summary judgment motion was granted in full and the order became final. Yet their proposal resolution-that their counterclaim by stayed pending the expiration of plaintiffs' time to appeal or until a final decision affirms the summary judgment dismissing the complaint-would prevent the entry of a final order necessary for plaintiffs to pursue an appeal. Since defendants have disavowed any regard for their counterclaim beyond the life of the other claim in this case, their counterclaim will be dismissed for the failure to prosecute.

Dated: September 16, 1997

/s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

[3] Plaintiffs objected to defense counsel's direct correspondence under Local Rule 106(b). Nonetheless, the rule permits an exception for correspondence requested by a judge. Defense counsel's commitment in the July 23 letter was requested by the Court on July 18, 1997.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOVECON, Ltd., et al.,	)	
Plaintiffs,	)	
	)	**Civil Action No.**
v.	)	
	)	**95-1178-LFO**
BULGARIAN-AMERICAN	)	
ENTERPRISE FUND, et al.,	)	
	)	
Defendants.	)	

NOTICE

It is this 28th day of July 1997 hereby

NOTICED: that, with respect to the common-law defense asserted by BAEF, counsel should consult and be prepared to discuss the Restatement (Second) of Torts § 594 cmt. k; id. § 604; see also W. Page Keeton, et al., Prosser and Keeton on Law of Torts § 115 (5th ed. 1984); Laurence H. Eldridge, The Law of Defamation § 85b (1978). In particular, counsel should be ready to argue:

1. Whether the undisputed facts support a qualified privilege on the part of BAEF to defame Novecon based on the right of an entity to defend itself against attack. See Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1559 (4th Cir. 1994); see also Haycox v. Dunn, 104 S.E.2d 800, 810-13 (Va. 1958); Shepherd v. Baer, 53 A. 790, 791-92 (Md. 1902).

2. Whether the undisputed facts support a finding that BAEF abused its qualified privilege by

publishing allegedly defamatory statements to "too broad an audience," i.e., whether mailing to the persons listed on Attachment EE to the Bauer Affidavit was reasonably necessary to serve BAEF's legitimate interests in protecting its reputation. see Foretich, 37 F.3d at 1559. In addition, counsel should be prepared to discuss and proffer evidence on the following issues concerning the constitutional defense raised by BAEF:

3. Whether there is sufficient indicia that Novecon is a bona fide corporate entity that is distinct from Richard Rahn, e.g., stock ownership, employees, compliance with corporate formalities.

4. Whether Novecon, as a corporation, could or did derive any benefit from the letters written by Richard Rahn and addressed to various members of Congress.

/s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
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NOVECON, Ltd., et al.,	)	
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	)	
Defendants.	)	

MEMORANDUM

An Order dated September 16, 1997 reconsidered defendants' motion for summary judgment and dismissed plaintiff Novecon's defamation claim, plaintiffs' remaining cause of action. This memorandum supplements the accompanying September 16 Memorandum *sua sponte*.

On August 11, 1997, plaintiffs objected to the affidavit of defendant Frank Bauer, which referenced but did not disclose the list of recipients of defendants' allegedly defamatory letter. Plaintiffs' objection states, "Without the names of recipients, plaintiff cannot adequately respond and this court cannot rule." Pl.'s [sic] Objections to Frank Bauer Aff. at 2 [hereinafter Objections]. Specifically, plaintiffs relied on Rule 56(f) of the Federal Rules of Procedure, which permits a court to deny or stay a motion for summary judgment and order additional discovery if "the party opposing the motion... cannot... present by affidavit facts essential to justify the

party's opposition...." Fed. R. Civ. Pro. 56(f). The September 16 Memorandum dismissed these objections, citing plaintiffs for their failure to "file[] the affidavit contemplated by Federal Rule of Procedure 56(f)...." Memorandum, at 5 n.1.

The meaning of Rule 56(f) is plain. It only permits mandated discovery in aid of opposition to summary judgment "[s]hould [the need] appear from the affidavits of the party opposing the motion...." Fed. R. Civ. Pro. 56(f). Our Court of Appeals has read this language as an exception that opposing counsel will file their objections under oath. See, e.g., Londrigan v. FBI, 670 F.2d 1164, 1175 (D.C. Cir. 1981) ("Counsel for Londrigan complied with the prerequisites for invocation of Rule 56(f) by submitting an affidavit to the District Court explaining why he was unable to offer material in opposition to the FBI's summary judgment motion."). As noted by one commentary, the consequence of ignoring this "prerequisite[]" is typically severe:

> [T]he rule will not be literally applied to aid parties who have been lazy or dilatory. The most obvious indication of lack of diligence is a failure on the part of the non-movant to present affidavits under either subdivision (e) or (f).

10A Wright, et al., Federal Practice and Procedure § 2740, at 535 (2d ed. 1983) (footnote omitted); see also Mid-South Grizzlies v. National Football League, 720 F.2d 772, 780 n.4 (3rd Cir. 1983) (listing precedents).

By only filing an Objection to defendants Frank Bauer's testimony, plaintiffs have failed to comply with the plain letter of Rule 56(f). Nonetheless, the September 16

Memorandum did not acknowledge an exception that this Circuit has carved from the affidavit requirement. In First Chicago International v. United Exchange Co., 836 F.2d 1375, 1380 (D.C. Cir 1999), our Court of Appeals "excused the absence of a Rule 56(f) filing on the grounds that other documents filed by the plaintiff-such as opposing motions and outstanding discovery requests-sufficed to alert the district court of the need for further discovery and thus several as the functional equivalent of an affidavit." Under these particular conditions, a "more flexible approach" to the opposing party's error is warranted. Id.

Even so, defendants are entitled to summary judgment on plaintiff Novecon's defamation claim. Plaintiffs' objections to defendant Bauer's affidavit, procedural formalities aside, do not meet the substantive threshold of Rule 56(f). Plaintiffs have failed to establish their inability to "present by affidavit facts essential to justify [their] opposition" to summary judgment. Fed. R. Civ. Pro. 56(f). Disclosure of every individual recipient of defendants' allegedly defamatory letter would not create a genuine issue of material fact or alter the judgment on the three common law issues identified in plaintiffs' August 11 Objection-"(1) malice (2) excessiveness of the response [by defendants] (3) and too broad an audience." Objection, at 3.[1]

The substance of the plaintiffs' three objection is the same, the additional discovery will reveal the inappropriateness of the defendant BAEF's public relations campaign to defend its business reputation. First, plaintiffs

[1] This case differs from First Chicago International in one important respect. In this case, the district court had granted summary judgment even though "virtually no discovery on the merits had occurred...." First Chicago Int'l, 836 F.2d at 1380. Here, the parties have engaged in discovery for close to a year.

sought to prove that the purpose of the letter at issue here was "a malicious character assassination on Novecon," actionable even under the actual malice standard. Id. at 4. If potential partners and investors of Novecon were recipients of the letter, plaintiffs contended, there would be evidence that "[t]he obvious intent was not to respond to [negative publicity about BAEF] but to hurt Novecon[, which] would go to the malice issue." Id. at 1.

This argument misconstrues the actual malice standard application to plaintiffs Novecon and Richard Rahn, who qualify as limited-purpose public figures. See September 16 Memorandum, at 5-6; Novecon, Ltd. v. Bulgarian -American Enter. Fund, 967 F. Supp. 1382, 1391 (D.D.C. 1997). As the Supreme Court has noted. "The phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 n. 7 (1989); see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991). To demonstrate actual malice, a claimant must prove that a statement was made

> with "knowledge that it was false or with reckless disregard of whether it was false or not." Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," or acted with a "high degree of awareness of... probable falsity[.]"

Id. (citations omitted). Here, plaintiffs have not explained how circumstantial evidence that might shed the slightest light on defendants' motives would create a genuine issue of material fact relevant to the actual malice inquiry.

While "it cannot be said that evidence concerning motive... never bears any relation to the actual malice inquiry," Harte-Hanks, supra, at 668, the discovery that plaintiffs sought was not a matter of law "essential to justify [plaintiffs'] opposition" to summary judgment. Fed. R. Civ. Pro. 56(f).

Second, plaintiffs opposed summary judgment in their August 11 Objection on the grounds that the disclosure of every letter recipient could expose the excessiveness of BAEF's reaction to negative publicity. As plaintiffs were right to observe, the common law privilege of defending one's reputation-upon which defendants' summary judgment motion and the September 16 Memorandum relied-is qualified by the rule of reason. "A person replying to an attack may not... 'indulge[] in language that is unnecessarily defamatory.'" Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1562 (4th Cir. 1994), quoted in Objections at 3.

As an argument against summary judgment, however, plaintiffs' claim is wide of the mark in the circumstances here. The complete text of BAEF's letter, in both Bulgarian and English, has long been available to plaintiffs. (The two versions are otherwise identical, except that the Bulgarian version removes the disputed reference to Novecon's contract proposal as "a veritable 'Brooklyn Bridge' of misrepresentation," since the American figure of speech would have been lost on foreign readers.) Plaintiffs could proffer only one suggestion how the list of recipients, as distinguished from the text, might bolster their argument that BAEF's public relations campaign was excessive: "Without the list it is not certain that the letter is identical to all in Bulgaria." Objections, at 2. This conjecture, however, is dwarfed by the weight of

the uncontroverted record that all recipients in Bulgaria received exactly the same text. Standing on its own, it is no grounds for denying defendants' motion for summary judgment. See, e.g., Greenberg v. FDA, 803 F.2d 1213, 1224 (D.C. Cir. 1986 ("if the court determines that... discovery would be wholly speculative, relief under Rule 56(f) must be denied.").

Third, plaintiffs opposed summary judgment in their August 11 Objections on the basis that BAEF's letter may have reached too broad an audience to constitute a reasonable defense of its reputation. Presumably, the disclosure of a list of actual recipients would bolster plaintiffs' claim that "[t]his massive mailing [was] breathtaking in its scope." Pl.s' Br. in Opp. to Def.'s Mot. for Summ. J., at 22. Yet this argument likewise is unpersuasive in the face of defendants' grounds for summary judgment. There is, after all, no dispute about the number of letters that BAEF mailed; only the precise identities of the recipients are unknown. Defendants' mailing to several hundred addresses must be viewed in light of the negative press coverage BAEF received in Bulgarian and international newspapers, reaching tens of thousands of readers. See September 16 Memorandum, at 8-9 ("Appraised by a rule of reason, defendants' choice of recipients for its communication is sufficient to carry their burden under the common law qualified privilege.").

The potential that defendants' letter might have reached some individual recipients whose opinions of BAEF were unaffected by the negative publicity would not create a genuine issue of material fact. The Bauer, Rollins, and Schiller Affidavits attest to the careful reasoning process by which defendants selected the categories of recipients. Discovery might conceivably disclose some

person who was erroneously included in a category. However, as noted in September 16 Memorandum:

> The common law qualified privilege asserted here does not demand that defendants demonstrate failsafe precision in identifying third parties with a sufficient interest in BAEF's public controversy. As the Restatement persuasively states the proposition:
>
> > If on an occasion giving raise to a conditional privilege the publisher mistakenly communicates the defamatory matter to some person to whom he is not otherwise privileged to publish it, he is protected if... he reasonably believes that the person to whom he communicates it is a person whose knowledge of the matter would be useful in the protection of the interest in question.
>
> Restatement (Second) of Torts § 604 cmt. e (1977).

Memorandum, at 8.

As a final matter, the substance of plaintiffs' Objections cannot overcome the last grounds for summary judgment discussed in the September 16 Memorandum, that defendants' letter was an "exercise in poetic license... protected by the First Amendment...." Id. at 12. A cause of action for defamation requires first and foremost that the

communication in question be false or misleading. Read in their proper and complete context, the charge of deception and "extortion" in defendants' letter amounted to rhetorical hyperbole that is not readily susceptible to factual verification. See id. at 11. Regardless of the precise audience, therefore, no reasonable fact finder could find that defendants' comments were legally defamatory.

For these reasons, plaintiffs' opposition to summary judgment under Rule 56(f) does not disturb the September 16 Order, granting summary judgment for defendants and dismissing the parties' remaining claims.

Dated: September 24, 1997

/s/Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

(2)

No. 99-1220

IN THE

Supreme Court of the United States

NOVECON, LTD., NOVECON MANAGEMENT COMPANY and RICHARD W. RAHN,

Petitioners,

v.

BULGARIAN-AMERICAN ENTERPRISE FUND, FRANK L. BAUER and NANCY L. SCHILLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court will grant certiorari to review a United States court of appeals judgment which affirmed a summary judgment in favor of respondents (defendants below) in a contract and libel action based solely upon the common law of a state[1] with no federal issue being raised, much less an important one;[2] no conflict on any federal issue in any circuit; no suggestion from petitioners that the state law was improperly applied; and no suggestion that the judgment conflicts with any decision by the state court of last resort?

2. Whether, in any event, the district court's alternative holding, that *New York Times v. Sullivan,* 376 U.S. 254 (1964), and its progeny were a sufficient basis to grant summary judgment on the libel claim, was in error?

---

1. Following the adoption of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, "[t]he highest court of the District of Columbia is the District of Columbia Court of Appeals." D.C. Code § 11-102. The courts have consistently maintained that from the effective date of the Act, "when interpreting the common law of the District, the U.S. Court of Appeals follows the decisions of the District of Columbia Court of Appeals, which is, for Erie doctrine purposes, treated as if it were the highest court of the state. See D.C. Code Ann. § 11-102." *Rogers v. Ingersol-Rand Co.*, 144 F.3d 841, 843 (D.C. Cir. 1998).

2. The district court had granted summary judgment on two alternative grounds, namely the common law of the District of Columbia as to all claims and this Court's holding in *New York Times v. Sullivan,* 376 U.S. 254 (1964), and its progeny as to the libel claim.

3. Whether the Seventh Amendment is violated when a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is properly granted dismissing an action?

4. Whether the court of appeals was correct in finding that the district court did not abuse its discretion by rejecting petitioners' claims as to Rule 56(f) of the Federal Rules of Civil Procedure?

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STATEMENT OF THE CASE

The Petition for Certiorari misstates the facts and law undergirding this civil action for three contract-related claims (breach of contract, promissory estoppel, and quantum meruit), and a claim for libel.[3] The United States Court of Appeals for the District of Columbia Circuit affirmed a summary judgment dismissing petitioners' complaint pursuant to the common law of the District of Columbia.[4] The district court (per Judge Louis F. Oberdorfer) had granted summary judgment dismissing all claims on the basis of the District of Columbia common law. In addition, the district court also dismissed the libel count on the basis of the First Amendment to the United States Constitution as applied by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) (hereinafter "*New York Times v. Sullivan*"), and its progeny.

At the outset, therefore, one fact is clear. Petitioners hang their argument concerning a federal question on the alternative holding of the district court, not the judgment of the court of appeals below. The court of appeals affirmed

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3. Likewise, the opinions of the court of appeals and district court as reproduced in the Appendix to the Petition are garbled, words are misspelled, sentences are deleted, cases are merged, and in general the opinions as set forth in the Appendix appear not to have been proofread before being filed with this Court. References to the correct opinions below, where the Appendix contains an error, are therefore cited to the Federal Reporter, 3d Series or to the Federal Supplement. Otherwise, when there are no errors, citations will be to Petitioners' Appendix and be preceded by the letter "A".

4. Petitioners do not quarrel with the dismissal of the contract, promissory estoppel, and quantum meruit claims in their Petition for Certiorari.

the dismissal of all claims ***solely*** on the basis of District of Columbia common law and, as to the libel claim, the court of appeals stated:

> The district court dismissed this claim on the basis of both First Amendment and common-law privileges. As we find the common-law privilege sufficient to sustain the dismissal, we do not address BAEF's First Amendment argument.

(A 17).

Petitioners' "Questions Presented" and Petition For Writ of Certiorari therefore are misstatements of the facts and law of this case. They argue as if the First Amendment had been the basis for the court of appeals' decision, which it was not. The court of appeals did not reach the First Amendment arguments relating to the libel claim.[5]

A. The Contract Claims.

This action was originally brought for breach of contract, promissory estoppel, and quantum meruit claims arising out of a failed land project in Sofia, Bulgaria (A 2). The failed

5. The holding of the court of appeals is consistent with the statements of this Court in various contexts that: "If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." *Alma Motor Co. v. Timken-Detroit Axle Co., et al.*, 329 U.S. 129, 136-37 (1946), citing *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909); *Light v. United States*, 220 U.S. 523 (1911); *Spector Motor Service Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Ashwander v. Tennessee Valley Authority, et al.*, 297 U.S. 288, *reh'g denied*, 297 U.S. 728 (1936) (Brandeis, J., concurring). *See also Hurd v. Hodge, et al.*, 334 U.S. 24 (1948).

project involved the proposed development of a tract of land purchased by the Batsov family in 1895 and seized by the State of Bulgaria in 1954.

In short, petitioners[6] represented that they could provide title to, and zoning for, the project, for which they would receive fees. Petitioner Richard W. Rahn, a well-known economist in both the United States and Bulgaria, is president and CEO of Novecon. Respondent Bulgarian-American Enterprise Fund ("BAEF"), one of the United States Enterprise Funds,[7] was to provide financing and ownership of the project once title to the property was secured by petitioners and transferred to respondent BAEF. Respondent Frank L. Bauer is president and CEO of BAEF while respondent Nancy L. Schiller is BAEF's managing director.

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6. As the district court found, there are two Novecon companies listed as plaintiffs but no distinction has ever been drawn between them. All parties treated them as one in the district court and the court of appeals. Neither the Petition for Certiorari nor this Brief in Opposition treat them any differently. As to petitioner Rahn, no argument in petitioners' brief in the court of appeals dealt with Rahn and no argument was ever made that he was not a limited-purpose public figure.

7. BAEF was created by the United States government pursuant to the Support for East European Democracy Act, 22 U.S.C. §§ 5401, 5402, 5421 ("SEED" Act) (A 2). BAEF is overseen by the United States Congress and the United States Department of State but is controlled by a board of directors composed of distinguished businessmen and other professionals who serve their country without financial compensation. BAEF promotes private sector development and entrepreneurship in Bulgaria through, among other things, grants, loans, and equity investments. (A 2).

All parties had agreed that unencumbered title was required by respondent BAEF before it would proceed with any contractual arrangement and that petitioners would provide the title (A 4-5). Petitioners represented to respondents that restitution of the title to the property by Bulgaria to the Batsov heirs was "just a matter of procedure, does not pose any risks, and is currently underway" (JA 138).[8] In fact, however, title was never restituted. Two Bulgarian courts explicitly denied restitution to the Batsov heirs. Today — almost eight years after the first representations by petitioners — the tract of land still remains the property of Bulgaria. Therefore, even had there been a valid contract, it would have been impossible to perform by petitioners because they could never have produced the title to the land. Moreover, unknown to respondents at the time of petitioners' representations, five of the seven parcels were zoned by Sofia's Master Zoning Plan for a "Park only" and two were zoned by the same Master Plan for a "School only."[9]

B. The Libel Claim.

The following facts were carefully set forth in the court of appeals and district court opinions.

1. Petitioners' first attack: the Executive Branch.

In October 1995, four months after petitioners filed this action for the three contract-related claims, respondents received word from the U.S. Ambassador to Bulgaria,

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8. The letters "JA" preceding reference to a page number refer to pages in the Joint Appendix filed in the court of appeals.

9. The fact that any contract would have been impossible to perform was not addressed by either court below because neither court found that there was even a contract.

William Montgomery, that he had been contacted by petitioners, who gave him a document that generally attacked BAEF's management and contended that "[a]llegations of conflict of interest and theft of project ideas by individuals close to the senior staff have been made." It then offered, as an example of the alleged poor management and operations, the Novecon lawsuit (A 6-7). BAEF considered this to be a draft for publication. (A 7; JA 464). The document also noted that "Rahn has written members of Congress requesting hearings and investigation" of the Fund (A 7).

2. Petitioners' second attack: the Congress.

In November 1995, petitioners sent letters to members of Congress concerning BAEF management, stating:

> [t]here is considerable evidence that [BAEF] has abused its fiduciary responsibility with taxpayer money . . . ; does not have competent management; has conducted its activities in such a way as to give the appearance, if not the fact, of a conflict of interest . . . ; has acted in a manner damaging to legitimate U.S. businesses; and has damaged U.S. Bulgarian relations.

Novecon Ltd., et al. v. Bulgarian-American Enterprise Fund et al., 190 F.3d 556, 562 (D.C. Cir. 1999) (hereinafter "Novecon").

Again, the court of appeals noted — as a result of its extensive review of the record — that petitioners' letters to members of Congress paralleled "the October draft" given to the American Ambassador and offered this case as an example of poor BAEF management. (A 7-8). The court of appeals also pointed out that in closing, petitioners accused BAEF of "incompetence and arrogance" and

"mismanagement or worse," and urged that there should be a congressional investigation into petitioners' charges (A 8).

3. The controversy concerning BAEF management becomes a wide-spread public controversy.

Finally, on January 5-6, 1996, the *Wall Street Journal Europe* published an opinion piece highly critical of BAEF's management (A 8; JA 417). Petitioners admit that the article "focused on mismanagement of U.S. Government funds and oversight by the U.S. Agency for International Development" (Petition at 6). The *Wall Street Journal Europe* article was entitled "AID's Boondoggle in Bulgaria" (A 6). Again, the court of appeals noted that the article "made several of the charges contained in the October draft" given to the State Department and the November letters to various members of Congress. *Novecon, supra,* 190 F.3d at 562. The circulation for the *Wall Street Journal Europe* that day was 64,197 in Europe (JA 1199). Among other things, the article accused BAEF of "arrogance" and "shoddy performance," stemming "largely from a management cadre who spend most of their time drawing big salaries in comfortable offices." *Novecon, supra,* 190 F.3d at 562. It accused the Fund of maintaining a fleet of six cars in Chicago — the actual number was zero — and having spent large sums on computers, furniture, and rent. Four paragraphs of the article dealt with the Novecon lawsuit and noted: "Mr. Rahn, a respected former chief economist at the U.S. Chamber of Commerce, accuses the BAEF of breaching a contract to fund a residential and commercial real estate project in Sofia . . . [by] constantly trying to alter the deal's terms until they caused the project to collapse" (A 8). The article also quoted Ronald Utt, petitioner Novecon's managing director, as stating that BAEF was "in over their heads." *Id.*

The court of appeals noted another parallel between the letters to members of Congress and the *Wall Street Journal Europe* article. Both publications charged that BAEF had sent "four high-priced lawyers into federal court to fight over dubious claims about standing and venue" in the case at bar. *Novecon, supra,* 190 F.3d at 562.

By January 15, 1996, the largest Bulgarian newspaper, *24 Hours,* with a circulation of 236,740 for that day, republished the charges in the *Wall Street Journal Europe* article in two articles without mentioning the *Wall Street Journal Europe* article itself (JA 1135, 1199).[10] Indeed, one article in *24 Hours* quoted "The President of Novecon" in a telephone interview as saying that "This Fund does not defend the interest of Bulgaria at all" (JA 791).

Respondents believed, therefore, that they had no choice but to respond to protect the interests of the Fund. However, when they did, they did so in a most temperate and objective way by including in the package the original critical *Wall Street Journal Europe* article, the letter to the Editor, and the letter complained of.

REASONS FOR DENYING THE WRIT

The opinion of the court of appeals is based solely on the common law of the District of Columbia and nowhere do Petitioners claim that the court of appeals misapplied the District of Columbia common law.[11] No federal question,

10. This publicity was followed four days later by the charges being repeated in two articles in another Bulgarian newspaper, *Standart,* with a circulation of 53,839 for that day (JA 1135).

11. As this Court has pointed out, "[w]hat was ruled by the Court of Appeals . . . was not specified as error in the petition for the writ, and will be assumed to be correct." *Prudence Co., Inc. v. Fidelity & Deposit Co. of Maryland,* 297 U.S. 198, 208 (1936).

much less an important one, has been presented to justify the granting of the petition. No federal statute is involved. Petitioners do not argue that the District of Columbia common law was incorrectly applied by the court of appeals. And, referencing Rule 10 of this Court, there are no allegations that the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" (Sup. Ct. R. 10).

Petitioners' other arguments concerning issues arising under *New York Times Co. v Sullivan* and its progeny are simply not relevant here. Their arguments concerning discovery and the Seventh Amendment are likewise in error. The petition for a writ of certiorari should be denied.

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE COMMON LAW OF THE DISTRICT OF COLUMBIA IN GRANTING RESPONDENTS SUMMARY JUDGMENT.

This action was commenced by petitioner Novecon against BAEF on June 21, 1995 for contract fees, promissory estoppel, and quantum meruit (A 6). The complaint was later amended to include a claim for libel. Respondents moved for summary judgment in the district court on October 1, 1996 (JA 372). In two orders, the district court, after correctly noting that "the parties have engaged in discovery for close to a year" (A 74, n.1), granted the motion for summary judgment.

As to the libel count, the district court made clear that the dismissal was on alternative and independent grounds: first, that two District of Columbia common-law qualified privileges existed as a matter of law,[12] and there was absolutely no evidence of common-law malice, as defined by the Courts of the District of Columbia, to defeat the privileges. The district court, citing D.C. Court of Appeals cases, concluded:

> Here, BAEF's interest in defending its business reputation before U.S. government agencies, Bulgarian officials, and actual and potential business relations within the Bulgarian private sector is manifest. The foregoing facts demonstrate that plaintiffs themselves stimulated the interests of the governmental, media, and commercial parties who received defendants' allegedly defamatory communication. Plaintiffs initiated the lawsuit. It was they who went public with it, their account embellished by derogatory remarks about defendants generally.

Novecon Ltd., et al. v. Bulgarian-American Enterprise Fund, et al., 977 F. Supp. 45, 49-50 (D.D.C. 1997).

Second, the district court found that petitioners were limited-purpose public figures and that there was no evidence of malice as defined by this Court in *New York Times v. Sullivan* and its progeny.

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12. These two common-law qualified privileges are the qualified privilege of reply or self defense and the qualified privilege afforded publication to persons having a common interest in the subject matter.

As pointed out above, the court of appeals affirmed the summary judgment on all claims on the basis of the District of Columbia common law. As to the dismissal of the contract claims, the court of appeals reviewed District of Columbia case law and concluded:

> In sum, we agree with the district court that no reasonable trier of fact could conclude that the exchange of communications between Novecon and BAEF constituted an agreement by both parties to be bound by their terms. Rather, the letters were "merely a part of the preliminary negotiations looking toward the execution of a contract in writing and by [their] own terms negate[d] the idea that [they] were intended as an offer which thereafter could be accepted . . . without the necessity of a formal written document covering all the terms." *Simplicio v. National Scientific Personnel Bureau, Inc.*, 180 A.2d 500, 502 (D.C. 1962).

Novecon, supra, 190 F.3d at 565.

As to the libel claim, the court of appeals analyzed the applicable District of Columbia law and explained why affirmance of the district court was warranted.

A. The court of appeals correctly determined that under the District of Columbia common law the existence of a privilege is a question of law for a court.

First, the court of appeals recognized that in the District of Columbia, as elsewhere, the application of any privilege in a libel action is a question of law for the court. The court

of appeals cited *Columbia First Bank v. Ferguson*, 665 A.2d 650 (D.C. 1995); *Altimont v. Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C. 1977); and *Mosrie v. Trussell*, 467 A.2d 475 (D.C. 1983), for this well-known proposition.

B. The court of appeals correctly found that the qualified privilege of reply or self defense and the privilege based on a common interest in the subject matter exist in the District of Columbia.

Second, the court of appeals found that the common-law privilege of self defense or reply (A 17) and the privilege of publication to persons having a common interest in the subject matter (A 18, n.5) are both recognized under the District of Columbia common law. It stated:

> The District of Columbia recognizes "self defense" as a qualified privilege constituting a complete defense to a claim of libel or defamation. *See Mosrie v. Trussell*, 467 A.2d 475, 477 (D.C. 1983); *Dickins v. International Bhd. of Teamsters*, 171 F.2d 21, 24 (D.C. Cir. 1948). "When the author of a libel writes . . . for the protection of his own rights or interests, that which he writes is a privileged communication unless the writer be actuated by malice." *Dickins*, 171 F.2d at 24.
>
> * * *
>
> There is no question but that the privilege applies in this case. BAEF and its management had been subjected to serious attacks in letters to Congress and articles in the press, and were privileged to respond to those attacks in self defense. Thus, "the

> dispositive issue in this case, as in most cases involving an assertion of qualified privilege, is whether there has been sufficient evidence of malice to overcome the privilege." *Columbia First,* 665 A.2d at 656. The burden of proof to make that showing rests on the plaintiff. *Mosrie,* 467 A.2d at 477; *Altimont,* 374 A.2d at 290 (footnote omitted).

Novecon, supra, 190 F.3d at 566-67.

Likewise, as to the defense afforded publications to persons having a common interest in the subject matter, the court of appeals carefully pointed out:

> To be protected by that privilege, "the statement must have been (1) made in good faith, (2) on a subject in which the party communicating has an interest . . . , (3) to a person who has such a corresponding interest." *Moss v. Stockard,* 580 A.2d 1011, 1024 (D.C. 1990). For essentially the same reasons discussed below, those requirements are satisfied here. BAEF made the statement in the good-faith belief that it was necessary to protect the interests of the Fund from what it saw as a false and potentially damaging attack on its reputation for fair dealing, and sent it to those with either an interest in or business dealings with the Fund.

Id. at 566, n.5.

C. The court of appeals correctly found that common-law malice in the District of Columbia is strictly construed and the publication must be solely from express malice with no other motivation possible.

Third, the court of appeals then noted that while malice is necessary to overcome a qualified privilege, "District of Columbia law makes it very difficult to overcome a qualified privilege" (A 18). Indeed, the D.C. Court of Appeals has held that when the statement complained of is published on a privileged occasion, there is a presumption that malice does not exist, *viz*:

> [T]he declarant "will be presumed to have been actuated by pure motives in its publication." *Ashford v. Evening Star Newspaper Co.*, 41 App. D.C. 395, 405 (1914), and the plaintiff therefore has the burden of proving that the declarant acted with malice. *Ford Motor Credit Co., supra,* 367 A.2d at 1314.

Columbia First Bank, supra, 665 A.2d at 656.

The court of appeals, however, did not stop there. The court explained that under District of Columbia common law, actual malice means express malice:

> Common-law malice . . . "emphasize[s] bad faith and evil motive." [citing *Moss v. Stockard,* 580 A.2d 1011, 1026, n.29 (D.C. 1990)]; *see Mosrie,* 467 A.2d at 477. It is "the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as

> to constitute ill will." *Moss,* 580 A.2d at 1025; *Mosrie,* 467 A.2d at 477. And "unless the statement itself is 'so excessive, intemperate, unreasonable, and abusive as to forbid any other reasonable conclusion than that the defendant was actuated by express malice,' malice must be proven by extrinsic evidence." *Moss,* 580 A.2d at 1024 quoting (*Ford Motor Credit Co. v. Holland,* 367 A.2d 1311, 1314 (D.C. 1977)); *see Columbia First,* 665 A.2d at 656.

Novecon, supra, 190 F.3d at 567.

D. The court of appeals correctly found that under the District of Columbia common law, if there are motivations for the publication other than express malice, then there is no jury question and the action is to be dismissed.

Fourth, the court of appeals noted that if any proper purpose for the publication other than malice exists, then there can be no express malice as a matter of D.C. common law and nothing is left to the jury. The court cited three important D.C. Court of Appeals cases in this regard, namely: *Mosrie, supra*; *Columbia First Bank, supra*; and *Altimont, supra.*

The court of appeals reviewed the standards set by the D.C. Court of Appeals for finding a vitiating form of malice. It noted that the mere existence of ill will on the part of the publisher, or the fact that the publisher enjoyed defaming the plaintiff or felt resentment and indignation toward the plaintiff, is insufficient to prove express malice. After examining District of Columbia law, the court of appeals stated:

"[T]he mere existence of ill will on the part of the publisher toward the subject of the publication does not defeat the publisher's privilege if the privilege is otherwise established by the occasion and a proper purpose." *Mosrie*, 467 A.2d at 477. Rather, the "court looks to the primary motive by which the defendant is apparently inspired; and, the fact that he feels resentment and indignation towards the plaintiff and enjoys defaming him will not forfeit the privilege so long as the primary purpose is to further the interest which is entitled to protection" *Id.* at 477-78; *see Columbia First*, 655 A.2d at 656. Most significantly,

> if the language of the communication and the circumstances attending its publication by the defendant are as consistent with the nonexistence of malice as with its existence, there is no issue for the jury, and it is the duty of the trial court to direct a verdict for the defendant.

Mosrie, 467 A.2d at 478 (quoting *National Disabled Soldiers' League, Inc. v. Haran*, 4 F.2d 436, 441-42 (D.C. 1925)); *see Altimont, supra*, 374 A.2d at 291; *Dickins*, 171 F.2d 21 at 25.

Novecon, supra, 190 F.3d at 567.

E. The court of appeals correctly determined that there was a legitimate basis for defendants' letter thereby negating express malice under District of Columbia common law.

Fifth, the court of appeals noted that "we cannot deduce the necessary malice from BAEF's words alone" (A 20). First, the court of appeals analyzed the District of Columbia cases and held that if there is any legitimate justification for the publication complained of, the issue becomes a matter for the court. The court of appeals, after finding that the language used mandated a dismissal under District of Columbia law, stated:

> [H]ere the word "extort" was used as "a vigorous epithet" by "those who considered" Novecon's litigating position "extremely unreasonable." And there can be no question that BAEF actually believed that Novecon's litigating position — its claims that BAEF had breached a binding contract and so should pay it $200,000 — was unreasonable. BAEF vigorously defended itself against Novecon's contract claim in the district court, and we have upheld that defense. Accordingly, we cannot find that BAEF's choice of epithets " 'forbid[s] any other reasonable conclusion than that the defendant was actuated by express malice.' " (*Moss*, 580 A.2d at 1024 (quoting *Ford Motor*, 367 A.2d at 1314)).

Novecon, supra, 190 F.3d at 568-69.

The court of appeals reviewed the language complained of and stated that while the words were perhaps harsh, they

were not of the degree required by the District of Columbia courts for a finding of malice in the District of Columbia. In fact, after making its analysis, the court of appeals stated that "statements the District of Columbia Court of Appeals found protected by the self-defense privilege in *Mosrie v. Trussell* were at least as harsh and intemperate as those at issue here." The use of the word "extort" does not change this conclusion and in fact, in context, is mere rhetorical hyperbole. This Court and others have repeatedly found that bringing a meritless action is considered to be a form of extortion.[13] Moreover, the court of appeals believed that the

13. For example, as this Court pointed out per Burger, C.J., in dealing with the application of Rule 23 of the *Federal Rules of Civil Procedure*: "District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). In concurring in *Reiter*, Justice Rehnquist stated: "And pronouncements from this Court exhorting district courts to be 'especially alert to identify frivolous claims brought to extort nuisance settlements' will not be a complete solution."*Id.* at 345. Justice Thurgood Marshall pointed out in his dissent in *Sedima S.P.R.L v. Imrex Co., Inc.*, 473 U.S. 479 (1985), "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is not surprising that civil RICO has been used for extortive purposes." *Id.* at 506. Future Justice Breyer in *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d. 468, 471 (1st Cir. 1985), discussed how the American system requires each party to pay its own attorney and noted:

> It may encourage plaintiffs to bring "strike suits" — suits that have no legal merit but which a plaintiff hopes the defendant will settle by paying the plaintiff something less than what it would cost to defend the suit. See generally Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371, 86 S. Ct. 845, 850, 15 L. Ed. 2d 807 (1966) ("strike suits" filed by parties "interested in getting quick dollars by making charges without regard

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> to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them"); Note, Extortionate Corporate Litigation: The Strike Suit, 34 Colum. L. Rev. 1308 (1934).

Lower courts have used the same language in cases too numerous to detail. For example: "[I]t is well known that frivolous class actions can sometimes extort sizeable settlements from the defendants." *Jones Motor Co., Inc. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190, 1193 (7th Cir. 1999); in referring to the decline of breach of promise actions, the Seventh Circuit explained that one reason is "the unfounded use of the suit . . . to extort out-of-court settlements." *Wildey v. Springs*, 47 F.3d 1475, 1479 (7th Cir. 1995); "Suits that are frivolous or groundless are true nuisances; indeed, they are sometimes thinly disguised forms of extortion, the kinds of activities that courts ought, for obvious reasons, not to encourage." *Tyler v. Corner Construction Corp. Inc.*, 167 F.3d 1202, 1206 (8th Cir. 1999); "Crampton was not content to allow her suit to die on the vine. Rather, she kept it alive, hoping to extort a nuisance-value settlement. . . . the willful continuation of a suit known to be meritless." *Edwards v. General Motors Corp.*, 153 F.3d 242, 247 (5th Cir. 1998); "Every frivolous suit requires time and attention and diverts the court from those matters which deserve its attention. . . . The plaintiff herein . . . if he continues to utilize the judicial system as a means to harass and extort, he can expect to face further severe sanctions." *Becker v. Sherwin Williams*, 717 F. Supp. 288, 290 (D.N.J. 1989);

> Apparently dissatisfied with Rule 9(b)'s failure to prevent abuse of the private securities laws by attorneys allegedly anxious to extort settlements generally "based not on the merits but on the size of the defendant's pocketbook," Congress amended the Securities Exchange Act of 1934 by enacting the Private Securities Litigation Reform Act of 1995.

Sheldon v. Vermonty, 31 F. Supp. 2d 1287, 1291 (D. Kan. 1998).

statement at issue was quite close to that considered by this Court in *Greenbelt Cooperative Publishing Assoc. v. Bresler,* 398 U.S. 6 (1970), in which this Court held that as a matter of constitutional law, the use of the word "blackmail" in the particular circumstances was not defamatory. Such is the case at bar.

However, respondents did not move for a summary judgment on the basis of truth or failure to state a claim, although they could have done so. They based their motion on the ground of privilege. In publishing their letter, respondents believed — and they still believe — that the contract action was completely without merit and was brought only to extort a settlement. When respondents wrote the letter, they knew that two Bulgarian courts had refused restitution of the title (JA 1191-93). This is the basis of the alleged libel. And here, both the district court and the court of appeals have agreed with respondents that the contract claims ***were*** meritless.

The court of appeals then turned to whether the letters were published on a privileged occasion. After a review of the facts and the law in this case, the court of appeals concluded, applying District of Columbia common law, that:

> Because no reasonable fact finder could find that "the language of the communication and the circumstances attending its publication by the defendant" were not at least "as consistent with the nonexistence of malice as with its existence, there is no issue for the jury." *Mosrie,* 467 A.2d at 478 (quoting *National Disabled Soldiers,* 4 F.2d at 441-42); *see Altimont,* 374 A.2d at 292. It therefore was "the duty of the trial court to direct a verdict for the defendant" on Novecon's claim of defamation. *Mosrie,* 467 A.2d at 479.

Novecon, supra, 190 F.3d at 570.

Petitioners argue that sending the letter to 570 carefully selected persons somehow raises an issue of fact concerning malice (Petition at 7). The court of appeals and the district court met this issue head-on. The court of appeals stated:

> The district court disagreed, as do we. As the court said, "the common law qualified privilege asserted here does not demand that defendants demonstrate failsafe precision in identifying third parties with a sufficient interest in BAEF's public controversy." 977 F. Supp. at 50.[8]
>
> [8] The Restatement (Second) of Torts states:
>
> If on an occasion giving rise to a conditional privilege the publisher mistakenly communicates the defamatory matter to some person to whom he is not otherwise privileged to publish it, he is protected if . . . he reasonably believes that the person to whom he communicated it is a person whose knowledge of the matter would be useful in the protection of the interests in question.
>
> Restatement (Second) of Torts § 604 cmt. e (1977) (quoted in *Novecon II*, 977 F. Supp at 50).
>
> BAEF sent its letter to "U.S. government agencies, Bulgarian officials, and actual and potential business relations within the Bulgarian private sector." *Id.* at 49. Specifically, the Fund

"attempted to reach persons whose opinions of BAEF were, or reasonably could have been, affected by plaintiffs' comments and the ensuing wave of negative publicity." *Id.* at 50. Approximately five hundred of the letters went to Bulgaria, with all but a handful of those going to borrowers from the fund. Bauer Aff. ¶ 91 (J.A. 472); Schiller Aff. ¶ 59 (J.A. 726). BAEF could not limit itself to readers of the *Wall Street Journal,* because the Rushford article had been republished in the Bulgarian press and Novecon had sent its own letters directly to members of Congress. As the district court explained, "defendants mailing to several hundred addresses must be viewed in light of the negative press coverage BAEF received in Bulgarian and international newspapers, reaching tens of thousands of readers." 977 F. Supp. at 55-56. *Compare Dickins,* 171 F.2d at 23-25 (finding no showing of malice where Teamsters' union responded to critical newspaper articles by attacking critics in teamsters magazine sent to "400,000 Teamsters and about 1,200 others, including all members of Congress, a number of colleges, libraries, newspapers and other periodicals").

Novecon, supra, 190 F.3d at 569-70.[14]

14. When *Dickins* was issued in 1948, the "decisions of the United States Court of Appeals . . . constitute[d] the case law of the District of Columbia." After February 1, 1971, the new District of Columbia Court of Appeals stated that "[a]s a matter of internal policy, we have adopted the rule that no division of this court will overrule . . . or refuse to follow a decision of the United States Court (Cont'd)

Respondents believed that they had no choice but to send the letters, and, as pointed out above, they sent them along with the original critical *Wall Street Journal Europe* article, the letter to the Editor, and the letter complained of. As respondent Schiller pointed out:

> The second matter that I remember is how hard Mr. Bauer, Ms. Rollins, and I worked to winnow down the list of the recipients to those who either knew about the controversy that Dr. Rahn seemed obviously to have generated or who would know about it eventually. It should be pointed out that the *Wall Street Journal Europe* and Bulgarian newspaper articles probably went to tens if not hundreds of thousands of readers. The letter I participated in writing went to 70 persons in the United States and only the Fund's borrowers and a small group in Bulgaria. I had no intent to injure Dr. Rahn but indeed we sent both sides of the controversy to the addressees. I had no malice towards Dr. Rahn but sent the letter to those individuals whom I believed had a common interest in the subject matter.

(JA 726).

Moreover, as both courts pointed out, the test is whether defendants believed that the extent of publication was needed, not whether some person was erroneously included in a category (A 25 n.8).

(Cont'd)
of Appeals rendered prior to February 1, 1971, and that such result can only be accomplished by this court en banc." *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (footnote omitted).

Therefore, because the court of appeals found good motivation for the letter, under the District of Columbia common law, there was no issue for the jury and summary judgment was properly granted.

II.

THE DISTRICT COURT CORRECTLY APPLIED THE FIRST AMENDMENT SAFEGUARDS BY GRANTING RESPONDENTS SUMMARY JUDGMENT.

Even if this Court wishes to review this case in the context of *New York Times v. Sullivan*, the district court correctly applied the law. The district court found that petitioners were limited-purpose public figures and that respondents did not act out of actual malice as defined by that landmark case and its progeny. It is not correct,as petitioners imply, that the district court found that petitioners had "achieved celebrity status"(Petition at 6).

III.

THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

There is no conflict on the issues raised in the instant case among the circuit courts of appeal. The purported conflict raised by petitioners is simply a variance among state laws. In casting about to find a federal issue, petitioners argue that "the question of whether there is a distinction between the First Amendment rights of a party who is part of the media and a non-media or private party have not been clearly resolved by this Court" (Petition at 5). Whatever the merits of this argument are, it is

not raised in this case by the court of appeals, which did not deal with the First Amendment considerations. Thus, no conflict exists among the circuits. Petitioners' attempt to argue that there is a conflict, based on *Swengler v. ITT Corp.*, 993 F.2d 1063 (4th Cir. 1993), merely underscores what this Court has long held:

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.

Ruhlin, et al. v. New York Life Ins. Co., 304 U.S. 202, 206 (1938).

The Fourth Circuit Court of Appeals in *Swengler* refused to dismiss a libel action between private parties on the basis that "[u]nder Virginia law, 'actual malice' is not a substantive element of defamation per se when the claim 'involv[es] a non-media defendant.' " *Swengler, supra,* 993 F.2d at 1071, n.5, quoting *Great Coastal Express v. Ellington,* 230 Va. 142, 334 S.E.2d 846, 851 (1985). Here, the District of Columbia law applies. And in the District of Columbia, the law is settled that the law of libel should apply to nonpublic figure plaintiffs confronting both media and nonmedia defendants. *See Vereen v. Clayborne,* 623 A.2d 1190, 1194-95 (D.C. 1993); *Moss v. Stockard,* 580 A.2d 1011 (D.C. 1990).

IV.

THE NEED FOR DISCOVERY IS A PRETEXT AND AN ATTEMPT TO MISLEAD THE COURT.

This action was filed on June 25, 1995. On July 24, 1996, over one year after the original complaint was filed, petitioners completed all of the discovery they ever noticed in this action

by demanding the production of every document in respondents' possession (JA 377-83). Respondents fully complied. Respondents moved for summary judgment on October 1, 1996, one year and three months after commencement of this action. As the district court noted: "Here, the parties have engaged in discovery for close to a year" (A 74 n.1).[15]

Petitioners utterly failed to meet the requirements of Rule 56(f), which requires affidavit proof setting forth why the party cannot present by affidavit the facts essential to justify the party's opposition. The wisdom of this requirement is underscored in the instant case because the allegations in the Petition are raised here for the first time, are false, and are not part of the record (Petition at 9).[16] However, the district court did discuss the merits of petitioners' argument relying on case law in the District of Columbia Circuit that excuses the absence of a Rule 56(f) affidavit if other documents filed by a party serve as the functional equivalent of an affidavit. The district court found not only that discovery had been available to

15. The district court did halt discovery on July 24, 1996, but only for six weeks so that counsel for respondents could travel to Bulgaria to complete the preparation of the motion for summary judgment. During this time, respondents were required to produce all documents demanded by petitioners, which was done. It is simply mendacious to argue that "plaintiffs, however, were denied the right to test the credibility of Bauer's affidavit by deposition because the trial court stayed discovery" (Petition at 9).

16. It is simply not true, as petitioners now allege, that "[b]oth Novecon, a private entity, and BAEF, a U.S. Government funded entity, were vying for business credibility in Bulgaria and competing for approval by the U.S. State Department in aiding the Bulgarians in an economic revival." (Petition at 9). Such an allegation was never raised below, is not true, and is belied by the fact that BAEF is a financial institution and petitioners are known in Bulgaria for importing Speedo bathing suits and "L.A. Gear" sports clothing.

petitioners for over one year and that they had engaged in it, but also that further discovery would have availed petitioners nothing (A 74-78).

The court of appeals affirmed the district court on the basis that "we cannot dispute the district court's conclusion that production of the names was not — as required by Rule 56(f) — 'essential to justify [Novecon's] opposition' to summary judgment. *Id.* at 54, 55-56" (A 26).

Under these circumstances, this Court has refused certiorari in the past. In *Appalachian Power Co., et al. v. American Institute of Certified Public Accountants, et al.,* Mr. Justice Brennan stated:

> [O]rdinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts.

80 S. Ct. 16, 18 (1959) (Per Justice Brennan, as Circuit Justice).

V.

PETITIONERS' SEVENTH AMENDMENT ARGUMENT IS WITHOUT MERIT.

Petitioners' Seventh Amendment argument does not reflect the law. Petitioners argue that:

> If Rule 56 is not violated in this case then there has been an intrusion into the province of the jury in violation of the Seventh Amendment to the Constitution. The Seventh Amendment guarantees

> the right to a jury trial in civil cases. Summary judgment cannot be used as a substitute for trial by jury. Yet in this case that is what occurred.

(Petition at 10).

This argument is meritless. As long as Rule 56 is properly applied, a losing party is not deprived of his Seventh Amendment rights. It is long-settled law that the summary judgment procedure does not violate the Seventh Amendment. This issue was first addressed by this Court in 1902 regarding a challenge to the District of Columbia's summary judgment rule in *Fidelity & Deposit Co. of Maryland v. U.S. ex rel. Smoot,* 187 U.S. 315 (1902). This Court stated:

> There is but one element in this contention, — the right of a jury trial . . . In Smoot v. Rittenhouse, *supra,* the validity of the rule was sustained, as well as the power of the court to make it. If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

Id. at 319-20.

Furthermore, the vigorous language of this Court in *In re Peterson,* 253 U.S. 300 (1920), can leave no doubt that the summary judgment procedure provided in Rule 56 does not infringe the constitutional right to trial by jury. In that case, the action had been referred to an auditor who simplified the issues

and wrote a report. The report was read to the jury as *prima facie* evidence. Concerning the claim that this procedure infringed on the Seventh Amendment, this Court said:

> The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. It does not prohibit the introduction of new methods for determining what facts are actually in issue nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. . . .
>
> In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. **No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined.**

Id. at 309-10 (emphasis supplied) (citations omitted).

In affirming the use of offensive collateral estoppel, Justice Stewart wrote:

> The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment. See Galloway v. United States, 319 U.S. 372, 388-393 (directed verdict does not violate the Seventh Amendment); Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 497-498 (retrial limited

> to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-321 (summary judgment does not violate the Seventh Amendment).

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336 (1979) (footnote omitted). *See also Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967) (judgment notwithstanding verdict does not violate right to jury trial); *Dimick v. Schiedt*, 293 U.S. 474 (1935) (permitting remittitur but not additur in federal court actions).[17] [18]

In sum, petitioners' Seventh Amendment arguments have been rejected by this Court and all other federal and state courts since this Court first dealt with the issue in 1902.

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17. The two cases cited by petitioners offer no support for their argument. In the dissent in *Parklane Hosiery Co. v Shore*, Mr. Justice Rehnquist restated support for *Neely; Galloway v. United States*, 319 U.S. 372 (1943); *In re Peterson;* and *Schiedt*. Likewise, in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), this Court held only that a combination of equity claims and law claims cannot deprive a party of its right to a jury trial.

18. *See also City of Chanute, Kansas v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992); *Plaisance v. Phelps*, 845 F.2d 107 (5th Cir. 1988); *Davis v. United States*, 742 F.2d 171 (5th Cir. 1984); *Barber v. Kimbrells, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978); *In the Matter of Diamond Door Company v. Lane-Stanton Lumber Co.*, 505 F.2d 1199 (9th Cir. 1974); *Caparaso v. CIR*, 907 F. Supp. 1235 (N.D. In. 1995); *Shabazz v. Odum*, 591 F. Supp. 1513 (M.D. Pa. 1984); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d § 2714; *Moore's Federal Practice*, 3d § 56.12.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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